80-1681

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
ILLINOIS, ET. AL.

Appellants,

v.

THE FLIPSIDE, HOFFMAN ESTATES,
INC., AN ILLINOIS CORPORATION

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED BY THE APPEAL

1. The Village's Drug Paraphernalia Licensing Ordinance defines the licensed goods as "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drug". The question presented is whether such phrase is so vague or overbroad as to render the definition unconstitutional.

PARTIES TO THE PROCEEDING BELOW:

Appellant is the Village of Hoffman Estates, Illinois, a Municipal Corporation; Virginia M. Hayter, Individually and in her official capacity as President of the Village of Hoffman Estates, Illinois; Richard Williams, Individually and in his official capacity as Attorney for the Village of Hoffman Estates, Illinois; John O'Connell, Individually and in his official capacity as Chief of Police for the Village of Hoffman Estates, Illinois; and the following, Individually and in their official capacity as Trustees for the Village of Hoffman Estates, Illinois: William W. Cowin, William A. Palmer, Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor and Lee Dodgion.

Appellee is The Flipside, Hoffman Estates, Inc., an Illinois Corporation.

TABLE OF CONTENTS

	PAGE
Question Presented by the Appeal	i
Parties to the Proceeding Below	i
Table of Authorities	iii
Opinions Below	2
Ground on Which Jurisdiction is Invoked	2
Constitutional Provisions and Ordinances Involved	3
Statement of the Case	3
The Question is Substantial	4
Conclusion	8
Appendix:	
Opinion of the Seventh Circuit Court of Appeals	1a
Opinion of the District Court	28a
Denial of Petition for Rehearing by the Seventh Circuit Court of Appeals	46a
Notice of Appeal	47a
Ordinance 969-1978	48a
Recent Drug Paraphernalia Cases	51a

TABLE OF AUTHORITIES

Cases

	PAGE
Colten v. *Kentucky*, 92 S. Ct. 1953, 407 U. S. 104 (1972)	5, 6
Grayned v. *City of Rockford*, 92 S. Ct. 2294, 408 U. S. 104 (1972)	5, 6
Leary v. *United States*, 89 S. Ct. 1532, 395 U. S. 6 (1969)	5, 7
McGowan v. *Maryland*, 81 S. Ct. 1101, 366 U. S. 420 (1960)	5, 7
Rose v. *Locke*, 96 S. Ct. 243, 423 U. S. 48 (1975)	6

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

This appeal is prosecuted by the Village of Hoffman Estates, and its respective officials, from a final judgment of the United States Court of Appeals for the Seventh Circuit, reversing a judgment entered in its favor by the United States District Court for the Northern District of Illinois.

THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not been officially reported but appears in the Appendix, p. 1a.

The opinion of the United States District Court, Northern District of Illinois, is officially reported at 485 F. Supp. 400 (1980), and further appears in the Appendix, page 28a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

On February 20, 1978, the Board of Trustees of the Village of Hoffman Estates, Illinois, enacted its Ordinance No. 969-1978:

The initial action was filed in the District Court for the Northern District of Illinois by The Flipside, Hoffman Estates, Inc. against the Village of Hoffman Estates and its officials, pursuant to 28 USC, 1331, 2201, 2202 and 28 USC 1343 and 42 USC 1983; it challenged the constitutionality of the ordinance and sought damages and declaratory and injunctive relief against enforcement of the Village of Hoffman Estates Ordinance. Following hearings on the requests for preliminary and permanent injunctions, the District Court concluded that the Village of Hoffman Estates Ordinance 969-1978 was constitutional and it entered final judgment for the defendant Village and officials.

An appeal was taken by Plaintiff to the United States Court of Appeals for the Seventh Circuit. The Appeals Court reversed the District Court in a judgment entered January 12, 1981. A petition for rehearing was filed in the Court of Appeals for the Seventh Circuit. On February 5, 1981, the Court of Appeals denied the petition for rehearing (Appendix p. 46a). A notice of appeal to this Court was filed on March 19, 1981, in the Court of Appeals for the Seventh Circuit (Appendix p. 47a).

The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

Fourteenth Amendment, United States Constitution:

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Village of Hoffman Estates Ordinance 969-1978 is set forth in the Appendix, at p. 48a.

STATEMENT OF THE CASE

In February of 1978, the Village of Hoffman Estates passed the subject ordinance in an effort to cope with the drug paraphernalia problem by licensing the sale to adults and banning the sale to minors. Eighteen months later, the Drug Enforcement Administration of the United States Department of Justice published a "Model Act" to deal with the problem which has been passed by many states and local jurisdictions and is the subject of much litigation throughout the country. The "Model Act" creates criminal penalties for possession of drug paraphernalia. The ordinance herein only licenses the business selling such items and does not criminalize the use or possession of such items.

The original complaint of Appellee Flipside requested damages and injunctive relief because, among other claims, it was alleged the ordinance was "void for vagueness". The United States District Court upheld the ordinance against all constitutional attacks including "void for vagueness".

The Court found that the ordinance was narrowly drawn and recognized that "paraphernalia" has become a standard

vocabulary word in the vernacular of the community, (38a) F. Supp. 407. It found that the terms were sufficiently clear to give a reasonably clear idea of what the law requires, (39a).

The Seventh Circuit Court of Appeals limited its opinion to only the "void for vagueness" issue finding the ordinance violative of the Fourteenth Amendment since a retailer "is unable to determine what the law expects of him" (26a). The Court recognized that "in the field of regulatory statutes governing business activities . . . greater leeway is allowed" but stated that said standard "does not fit in this case" (20a).

The Court also found no rational connection between testimony that the items had been found to be used with illegal drugs (fact proved) and that therefore, said items were marketed for use with illegal drugs (fact presumed) (18a).

THE QUESTION IS SUBSTANTIAL

As the United States Court of Appeals for the Seventh Circuit stated in this case: "There has been an explosion of litigation concerning so-called drug paraphernalia laws" (4a). Such litigation is the result of a three billion dollar industry (according to DHEW Pub. No. 80-963) that has heretofore conducted its business without local or state regulation despite the fact the product line glamourizes the use of controlled substances.

Two types of regulation have emerged; licensing as in the case herein, and criminal prohibition based upon the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration. Said Model Act has been adopted by twelve states and by numerous municipalities throughout the nation. One such case is presently on appeal to this court, *City of Parma et. al.* v. *Record Revolution, No. 6, Inc.*, as Case Number 80-1507.

Cases of the past two years are cited in the Appendix at p. 51a and are cited and narrated, not for the points of law, but to give foundation to the term "explosion" and to demonstrate the need of this court to take jurisdiction of this case to clarify the numerous conflicts so the nation's municipalities and states may more effectively deal with the problem of drug abuse.

The magnitude of the problem and wide splits of authority in the Federal Courts demonstrate that this case is of such importance as to warrant plenary consideration by this court.

The issue in this case is substantial in its own right.

Three United States Supreme Court Opinions were considered in the United States District Court and the United States Court of Appeals review of the matter, *Grayned* v. *City of Rockford,* 92 S. Ct. 2294, 408 U. S. 104 (1972); *Leary* v. *United States,* 89 S. Ct. 1532, 395 U. S. 6 (1969); and *McGowan* v. *Maryland,* 81 S. Ct. 1101, 366 U. S. 420 (1960). The United States Court of Appeals accepted the applicability of *Grayned* but rejected *Leary* and *McGowan.*

The purpose and theory of the ordinance was based upon three known and trustworthy legal facts: 1) the *Leary* test that "there must be a rational connection between the facts proved and the fact presumed"; 2) Ch. 23, Section 2357 of the Illinois Revised Code which provides that tobacco cannot be sold to persons under the age of 18; and 3) Ch. 56½, Section 1312 of the Illinois Revised Code which provides that purchasers sign for Class V controlled substances.

The approach was regulatory in the same manner the Village regulates milk (Hoffman Estates Municipal Code Section 8-5-8), flowers (Hoffman Estates Municipal Code Section 8-7-7) and 68 other activities requiring licensing.

In *Grayned,* it was said by Justice Marshall that given the specific context of the ordinance, a school situation:

> "The ordinance gives 'fair notice to those to whom it is directed'. Although the Rockford ordinance may not be as

> precise as the statute upheld in *Cameron* . . . the ordinance here clearly 'delineates its reach in words of common understanding' ". 408 U. S. at 112, 113.

In the same month as *Grayned,* Justice White said in *Colten* v. *Kentucky,* 92 S. Ct. 1953, 407 U. S. 104 (1972):

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional delemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We agree with the Kentucky court when it said: 'We believe that citizens *who desire to obey* the statute will have no difficulty in understanding it . . .' " (Emphasis added), 407 U. S. at 110.

In a 1975 decision, *Rose* v. *Locke,* 96 S. Ct. 243, 423 U.. 48 (1975), the Per Curiam decision stated when a statute for "crimes against nature" was claimed to be vague:

> "All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.
>
> Viewed against this standard, the phrase 'crimes against nature' is no more vague than many other terms used to describe criminal offenses at common law and now codified in state and federal penal codes", 423 U. S. at 50.

They further said:

> "But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties", 423 U. S. at 50.

It is again noted that the ordinance in question is a licensing ordinance for regulation purposes only and that, like *Grayned,* it gives fair notice to whom it is directed, the retailer. It is not an ordinance prohibiting possession of items by citizens

of the community who may or may not be appraised or aware of said ordinance, such as an ordinance based upon the "Model Act", but a regulatory ordinance for specific retailers who have the opportunity of clarification prior to license application.

The *McGowan* case said:

> "We believe that *business people of ordinary intelligence in the position of appellant's employer would be able to know what exceptions are encompassed by the Statute* either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county. . ." (emphasis added), *McGowan* v. *Maryland,* 366 U. S. at 428.

While it can be argued that persons in the industry which is to be regulated can know or should know what pipes are designed for marijuana and what pipes are designed for regular tobacco, either through their own expertise or by making reasonable investigations, the Village nonetheless would rely on *Leary* and would have the burden of proof to prove the marketing *intent* in any licensing violation hearing.

By failing to follow the dictates of this court, enforcement powers of states and municipalities by means of licensing or any other means against purveyors of drug paraphernalia are being held in abeyance. Because of fears of "unconstitutional policies" and damage suits under 42 USC, Section 1983, there is a chilling effect on government to attempt any regulation in this area and, therefore, this substantial issue warrants the court's full review.

CONCLUSION

The question presented by this appeal is substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1462

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation,

Plaintiff-Appellant,

v.

VILLAGE OF HOFFMAN ESTATES, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 2114—**George N. Leighton**, *Judge.*

ARGUED OCTOBER 22, 1980—DECIDED JANUARY 12, 1981

Before SPRECHER and WOOD, *Circuit Judges*, and TEMPLAR, *Senior District Judge.**

SPRECHER, *Circuit Judge*. This appeal involves the validity of an ordinance of the Village of Hoffman Estates, Illinois ("village") purporting to regulate merchants who sell items designed or marketed for use with illegal cannabis or drugs. Plaintiff, a Hoffman Estates record store, appeals the district court's denial of plaintiff's motion for a permanent injunction and declaratory relief.

* Senior District Judge George Templar from the District of Kansas is sitting by designation.

No. 80-1462

I

On February 20, 1978, the Village of Hoffman Estates Board of Trustees enacted Ordinance No. 969-1978, entitled "an Ordinance Amending the Municipal Code of the Village of Hoffman Estates by Providing for Regulation of Items Designed or Marketed for Use with Illegal Cannabis or Drugs," to be effective May 1, 1978. The ordinance requires that any person within the village who sells any "item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" must obtain a license for $150.00, file affidavits averring that the applicant and each employee authorized to sell such items has never been convicted of a drug-related offense, and keep records, to be open for police inspection, of every covered item sold, along with the name and address of the purchaser. The ordinance prohibits sale to minors of any covered items. Any violation of the ordinance is punishable by a fine of not less than $10.00 nor more than $500.00, and each day that a violation continues is deemed a separate offense. In addition, the village attorney prepared "license guidelines" which define certain terms relevant to the ordinance.

Plaintiff Flipside Records ("Flipside") for more than three years prior to May 1, 1978, sold a wide variety of merchandise including smoking accessories, jewelry, novelty devices, and literature. Among these items were clamps, "alligator clips," mirrors, pipes of various types and sizes, and a large number of cigarette rolling-papers in a variety of colors. Soon after enactment of the ordinance, plaintiff was notified that Flipside appeared to be marketing items that would be covered by the ordinance. Alleging that it was unable to determine which items would be covered by the ordinance, and wishing to avoid a violation and arrest which might preclude Flipside's access to a federal forum for adjudication of its constitutional claims, Flipside removed from its shelves a wide variety of merchandise.[1] On May 30, 1978, Flip-

[1] Larry Rosenbaum, one of Flipside's officers, consulted Richard Williams, the village attorney, about which items at

(Footnote continued on following page)

No. 80-1462

side initiated proceedings in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that the ordinance violated the First, Fourth, Fifth, Eighth and Fourteenth Amendments, Article I, Section 8, Clause 3 and Article I, Section 10 of the United States Constitution. Plaintiff also sought temporary, preliminary and permanent injunctive relief to restrain enforcement of Ordinance No. 969-1978, and damages pursuant to 42 U.S.C. § 1983 for the actions of the village and its agents,[2] which allegedly caused Flipside to be deprived of rights secured to it by the United States Constitution.

On May 30, 1978, Judge Leighton denied plaintiff's motion for a temporary restraining order. On September 1, 1978, a hearing on the motion for a preliminary injunction was held, and Judge Leighton denied the motion. The trial for a permanent injunction and declaratory judgement was held on March 23, 1979. On February 11, 1980, the trial court entered a Memorandum Order awarding judgment to the defendants. *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 485 F.Supp. 400 (N.D.Ill. 1980). Plaintiff appeals that order on several constitutional grounds, alleging that Ordinance No. 969-1978 is impermissibly vague in violation of the due process clause of the Fourteenth Amendment and violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

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[1] *continued*
Flipside would be covered by the ordinance. Williams advised Rosenbaum to use the police register for *all* items, for his protection. (Transcript of March 23, 1979 at 87-88)

[2] Defendants are the village, an Illinois home rule municipality with a population of approximately 37,000; and, in their individual as well as official capacities, Virginia W. Hayter, village president; Richard Williams, village attorney; John O'Connell, village chief of police; William W. Cowin, William A. Palmer, Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor, Lee Dodgion, village trustees.

II

Since this case began in the district court, and indeed, since the district court's opinion was published in February, 1980, there has been an explosion of litigation concerning so-called drug paraphernalia laws. Most of the cases involve statutes or ordinances which make the sale, manufacture, or possession of drug paraphernalia a crime, usually a misdemeanor.[3] There have been a variety of results in the district courts, even within the same district.[4] As of this writing none of these paraphernalia law cases has been decided by a court of appeals on the merits,* although in *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980), in entering a preliminary injunction restraining enforcement of an ordinance the court flatly stated that the challenged ordinance was unconstitutionally vague on its face. 618 F.2d at 28.[5]

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[3] In *Housworth v. Glisson*, 485 F.Supp. 29 (N.D.Ga. 1978), *aff'd*, 614 F.2d 1295 (5th Cir. 1980), as here, there was not a criminal drug paraphernalia law at issue, but rather a licensing ordinance. In *Housworth* plaintiffs' business licenses were revoked for selling drug paraphernalia. The court found the licensing ordinance void for vagueness because it gave plaintiffs no adequate warning of the activity which would lead to license revocation.

[4] Identically worded statutes were treated differently within the same district in *Tobacco Road v. City of Novi*, 490 F.Supp. 537 (E.D.Mich.,S.D. June 21, 1979; On Motion For New Trial, March 12, 1980) (upholding City of Novi ordinance) and *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390 (E.D.Mich., S.D. April 9, 1980) (striking down city of Ferndale ordinance on vagueness grounds). In *Magnani v. City of Ames*, 493 F.Supp. 1003 (S.D.Iowa 1980), an identical ordinance also was struck down for vagueness.

* *See* note 32.

[5] Also, with respect to printed matter rather than paraphernalia, the Fifth Circuit found unconstitutional a statute prohibiting sale of drug-related printed material to minors. *High Ol' Times, Inc. v. Busbee*, 621 F.2d 141 (5th Cir. 1980), *affirming*, 456 F.Supp. 1035 (N.D.Ga. 1978). While many of the above mentioned challenges to paraphernalia laws allege first amendment violations, none of these statutes or ordinances ban sale of literature outright.

No. 80-1462

The challenges to drug paraphernalia statutes often involve a number of constitutional claims, as here where the village ordinance is attacked on due process, equal protection, and first amendment grounds. The successful attacks usually have won on the issue of due process: drug paraphernalia statutes have been found impermissibly vague in violation of the due process clause of the Fourteenth Amendment.[6]

In August, 1979, the Drug Enforcement Administration of the United States Department of Justice published the "Model Drug Paraphernalia Act" ("Model Act"). According to the comments published with the Model Act, it was drafted to enable states and local jurisdictions to cope with the paraphernalia problem and is intended to be enacted as an amendment to the Uniform Controlled Substance Act, which has been adopted by Illinois and many other states.[7] District courts have recently upheld laws based on the Model Act, although a

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[6] In general, those cases striking down paraphernalia laws (1) have found the definition of "drug paraphernalia" to be too vague to give adequate notice of what is prohibited and (2) have found inadequate the degree of intent or knowledge that an item is drug-related necessary to hold a defendant criminally liable under the statute or ordinance. *See Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980); *Record Head Corp. v. Sachen*, No. 80-C-639 (E.D.Wis. Sept. 30, 1980); *Hejira Corp. v. MacFarlane*, No. 80-F-824 (D.Colo. Sept. 5, 1980); *Magnani v. City of Ames*, 493 F.Supp. 1003 (S.D.Iowa July 21, 1980); *Smith v. Roark*, No. 80-2110 (S.D.W.Va. May 13, 1980); *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390 (E.D.Mich. April 9, 1980); *Knoedler v. Roxbury Township*, 485 F.Supp. 990 (D.N.J. March 5, 1980); *Indiana Chapter, N.O.R.M.L. v. Sendak*, No. TH 75-142-C (S.D.Ind. Feb. 4, 1980); *Record Museum v. Lawrence*, 481 F.Supp. 768 (D.N.J. Dec. 11, 1979). *See also, Bambu Sales, Inc. v. Gibson*, 474 F.Supp. 1297 (D.N.J. Aug. 6, 1979) (ordinance not vague, but struck down on overbreadth grounds).

[7] The Uniform Controlled Substance Act was enacted by Illinois in 1971. Ill.Stat.Ann. ch. 56½, § 1100 *et seq.* The Justice Department's Model Act is the model for Senate Bill 1505, introduced in the Illinois legislature but not as yet finally acted upon by both houses.

few have found it necessary to sever some parts.[8] These courts agree that criminal statutes, prohibiting the manufacture, sale, or possession of items determined to be drug paraphernalia, must be carefully drafted in order to focus on the drug-related intent of the person charged.[9]

III

The ordinance at issue here differs from the type of statutes at issue in the above-cited cases. Hoffman Estates Ordinance No. 969-1978 does not attempt to criminalize the sale or possession of drug-related devices. In fact, the preamble to the ordinance states, "it is recognized that such items are legal retail items and that their sale cannot be banned . . . ." Yet one of the purposes of the ordinance obviously must be to do in-

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[8] *Mid-Atlantic Accessories Trade Ass'n v. Maryland*, No. H-80-1343 (D.Md. Nov. 11, 1980); *Tobacco Accessories v. Treen*, No. 80-3372 (E.D.La. Oct. 28, 1980); *Florida Businessmen for Free Enterprise v. Florida*, TCA 80-0954 (N.D.Fla. Sept. 30, 1980) (upholding those portions of law based on Model Act, but striking sections that differ from the Model Act by punishing "possession" rather than "possession with intent to use" paraphernalia); *The Casbah, Inc. v. Thone*, No. 80-0-271 (D.Neb. Sept. 26, 1980) (ordinance constitutional after excising "reasonably should know" constructive knowledge/intent section and "legitimate supplier" evidentiary factor for determining whether an item is drug paraphernalia); *Florida Businessmen for Free Enterprise v. City of Hollywood*, No. 80-6157-Civ-NCR (S.D.Fla. Aug. 29, 1980); *Delaware Accessories Trade Ass'n v. Gebelein*, No. 80-285 (D.Del. Aug. 15, 1980); *World Imports v. Woodbridge Township*, 493 F.Supp. 428 (D.N.J. 1980); *Levas v. Village of Antioch*, No. 80-C-1574 (N.D.Ill. April 22, 1980) (definition of paraphernalia based on Model Act).

[9] *See* comments to Model Act and cases cited in note 8, *supra*. Most of these cases explain that the laws upheld escape vagueness because they require defendant's specific intent or knowledge that the items in question are used with illegal drugs. A statute is not unconstitutionally vague if it embodies a specific intent to violate the law. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952); *Screws v. United States*, 325 U.S. 91, 101 (1945).

directly what it claims it cannot do directly—to effectively ban the sale of a broad class of items, some of which may be used with illegal drugs. After all, few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of signing their names and addresses to a register available to the police. But the legal issue here does not depend on the covert purpose of de facto banning certain items. Even if the ordinance does discourage the sale of some "innocent" items, the ordinance would be constitutional so long as it carefully defined the items sought to be regulated so that a person in plaintiff's position could determine whether, and to which items, the license requirement applied.[10]

As stated in *Geiger v. City of Eagan*, 618 F.2d 26, 28 (5th Cir. 1980), a city "clearly has the power through a properly drawn ordinance to discourage the availability of drugs and the acceptance of drug use by prohibiting the sale of drug-related devices."[11] Thus the village may, with a properly drawn ordinance, regulate drug paraphernalia. The type of regulation chosen here bears a rational relation to the village's interest in preventing drug abuse. It prevents convicted drug dealers and users from selling paraphernalia and thereby gaining contacts with a ready market, and it forbids the sale of paraphernalia to minors. But sympathetic as we are with the village's attempt to fight drug abuse through this novel licensing scheme, the village must do so in a constitutional manner.

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[10] *See* discussion of vagueness in Part IV of this opinion.

[11] The court in *Geiger* went on to enter a preliminary injunction restraining enforcement of an ordinance which prohibited the "possession, sale, transfer or display for sale or transfer" of "drug related devices." While the grant of a preliminary injunction does not decide the merits, the court focused on the vagueness of the ordinance's definition of the term "drug-related device" and flatly declared "[w]e consider the ordinance unconstitutionally vague on its face." 618 F.2d at 28.

IV

The critical issue here is whether this ordinance is so vague as to violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Supreme Court set out the policies behind the due process doctrine of vagueness. In a passage cited in virtually every opinion dealing with vagueness challenges to statutes or ordinances, the Court stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws often offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09 (footnotes omitted). *See also Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

This ordinance is subject to attack for vagueness despite the fact that it is an ordinance, not a statute, and it purports to license,[12] not prohibit, sale of "items

[12] A more typical type of vagueness challenge to a licensing statute involves an attack on the standards for denying or revoking, rather than requiring, a license. *See Housworth v. Glisson*, 485 F.Supp. 29, 36-39 (N.D.Ga. 1978), *aff'd*, 614 F.2d 1295 (5th Cir. 1980). *Housworth*, like this case, involved attempted regulation of retail stores which sold items which could be used with illegal drugs. Plaintiffs' business licenses

(Footnote continued on following page)

designed or marketed for use with illegal cannabis or drugs." A law may run afoul of the vagueness doctrine even though it does not impose criminal sanctions, because the fundamental defect is not the penalty but rather "the exaction of obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). The lack of a criminal penalty in the ordinance does not excuse vagueness where the effect is to deprive persons of constitutional rights. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) ("this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"). *See also Bence v. Breier*, 501 F.2d 1185, 1188 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); *Soglin v. Kauffman*, 418 F.2d 163, 166-67 (7th Cir. 1969). Furthermore, in determining whether a civil or criminal enactment is sufficiently clear that persons affected can determine what the law requires of them, the same rules of construction apply whether it is a statute or an ordinance. *Martin v. King*, 417 F.2d 458, 461 (10th Cir. 1969).

In order to analyze plaintiff's facial attack on this ordinance, we set out the entire ordinance adopted by the

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[12] *continued*
were revoked based on a local ordinance which allowed the county director of finance to revoke the license of any business found to be a "hazard to the health, safety and welfare of the citizens of the county," 485 F.Supp. at 36. The court applied the *Grayned* standards, found the ordinance unconstitutionally vague, and preliminarily enjoined enforcement against plaintiffs. *See also Aladdin's Castle, Inc. v. City of Mesquite*, 434 F.Supp. 473 (N.D.Tex. 1977) (invalidating ordinance prohibiting issuance of license for coin-operated amusement center to anyone having a "connection with criminal elements").

There are obvious differences between *revoking* a license on the basis of inadequately defined conduct and *requiring* a license in order to engage in the conduct. But in both cases, because of the retailer's constitutionally protected interest in his business, the ordinance must be drawn clearly enough to warn a retailer of what the law requires.

village, as well as the license guidelines which became an integral part of the ordinance.

ORDINANCE NO. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia,

No. 80-1462

accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department

of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs $150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

As noted above, in order to survive a vagueness attack, an ordinance must give persons a reasonably clear

idea of what the law expects of them. We agree with the district court that "[i]t is obvious that this ordinance is not a model of legislative clarity; defendants do not claim that it is." 485 F.Supp. at 406. Of course, in determining whether a statute or ordinance is vague, a court cannot invalidate every ordinance which could have been drafted more precisely, since "[i]n most English words and phrases there lurk uncertainties." *Robinson v. United States*, 324 U.S. 282, 286 (1945). But the inherent vagueness of the English language, coupled with the admirable intention of stemming drug abuse, cannot save an ordinance which fails to give fair notice of what it prohibits.

According to the district court, the plaintiff should be able to tell what the ordinance requires of it by looking to the common, ordinary, dictionary meanings of the words "items", "effect", "paraphernalia", "accessory", and "thing".[13] But the fact that these five words have ordinary dictionary meanings does not sufficiently clarify the scope of the licensing requirement, which applies to any person who sells any "items, effect, paraphernalia, accessory or thing *which is designed or marketed for use with illegal cannabis or drugs.*" The italicized phrase is the key to triggering application of the statute. The words "designed", "marketed", "cannabis", and "drugs"

[13] The district court noted that plaintiff removed a total of 72 items from its shelves, and that thereafter defendants conceded that plaintiffs were in compliance with the ordinance because they no longer sold any ". . . thing which is designed or marketed for use with illegal cannabis or drugs." 485 F.Supp. at 407. The court stated that the removal of these items by plaintiffs demonstrates that "plaintiff was not hampered by any vagueness in the words of the subject ordinance." *Id.* Plaintiff vigorously denies that its actions represent any acknowledgment that it sold drug-related paraphernalia. Rather, a wide variety of items were removed from the shelves in order to ensure that no violation of the ordinance could be found. Plaintiff wished to avoid the initiation of local proceedings that might cause a federal court to abstain from considering plaintiff's constitutional claims until all state remedies had been exhausted. *Younger v. Harris*, 401 U.S. 37 (1971).

may also have common, ordinary meanings which can be found in a dictionary, but the entire phrase is more than the sum of the meanings of the individual terms used. Unless the license guidelines give additional clarity to this phrase, we must agree with plaintiff that the ordinance is so vague that it does not give sufficient notice to merchants as to whether they are required to obtain a license, and for which items the name and address of the purchaser must be recorded and sale to minors prohibited.

Turning first to the words of the ordinance, the primary words to be interpreted are "designed" and "marketed", since these words link the innocuous terms "item", "effect", "paraphernalia",[14] "accessory", and "thing" to illegal drugs, thereby triggering the regulatory purpose.[15] The phrase "designed for use with drugs" was held to be one of the fatal flaws, in an ordinance far more detailed than the one at issue here, by a three-judge district court in Indiana. In *Indiana Chapter, N.O.R.M.L. v. Sendak*, No. TH 75-142-C (S.D.Ind. Feb. 4, 1980) (Swygert, Cir. J. presiding)[16] the court stated:

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[14] The district court treated the term "paraphernalia" in the ordinance as having its non-technical meaning, namely "articles of equipment." 485 F.Supp. at 407, citing Webster's Third New International Dictionary (Unabridged ed. 1971) at 1638. But "paraphernalia" is also becoming a standard term to refer to the whole class of allegedly drug-related items which this ordinance attempts to regulate.

[15] The purpose of the regulation is found in the preamble of Ordinance No. 969-1978, which provides in part, "it is in the best interest of the health, safety, and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs."

[16] On appeal to this court the case was declared moot and remanded for dismissal because the Indiana Legislature had repealed the statute held to be unconstitutional, and the successor statute was the subject of new litigation. *Indiana Chapter, N.O.R.M.L. v. Sendak*, No. 80-1305 (7th Cir. July 22, 1980).

No. 80-1462

> It is unclear what is meant by an instrument "designed" for drug use. The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the ordinance] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.

Id., slip op. at 12-13.

The license guidelines imply that items "designed" for use with drugs mean those items which are inherently suited only for drug use, and are thus covered by the ordinance regardless of the manner of display or avowed intent of the retailer. For example, the guidelines state that "roach clips" are "*designed* for use with illegal cannabis or drugs and therefore covered," (emphasis added). But the guidelines do not define "roach clip." Consequently, stocking any item that could possibly be used as a roach clip, such as an alligator clip or bobby pin, could subject a retailer to the licensing requirement. In reality, it is inconceivable that sale of these innocent items would subject a hardware store or drugstore to the burdens of the license fee and sales register, as well as to the label of "drug paraphernalia store." Perhaps the village wishes to draw a line between items which inherently *are* roach clips and "innocent" items merely *used* as roach clips. But neither the ordinance nor the guidelines draws this distinction, and we are uncertain

as to whether any definition of a roach clip could draw such a distinction based on design alone.[17]

Another item which the guidelines say is inherently drug related is "paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed." But the guidelines also say that "white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed." This guideline attempts to tell the retailer which rolling papers are covered and which are not, but the definition is circular because it puts the burden back on the retailer to decide what is "tobacco oriented" paper not necessarily *designed* for use with drugs and what is "drug oriented" paper. Is all white rolling paper outside the ordinance, even if there is an advertisement for a water pipe on the package? Does "paper of colorful design" mean that brown or beige paper is covered, or could some colored paper be considered "tobacco oriented"?

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[17] The following exchange took place at the March 23, 1979, trial during Leavitt's questioning of Williams, the village attorney who drafted the ordinance and guidelines:

BY MR. LEAVITT:

Q What design differential between the alligator clip displayed in Exhibit No. 6 and the alligator clip displayed in No. 80?

A The design and marketing of the—

Q I asked only about design. Is there any design differential?

A No.

Q Now if I were to tell you that Exhibit No. 6 was sold in a Flipside Records without any signs but merely there where literature was displayed, where the literature that contained, The Child's Garden of Marijuana or whatever other literature they displayed, would it then be a regulated item?

A It would be if an officer could tell me that it can be used or is presumed to be used for illegal cannabis and drugs.

Transcript of March 23, 1979 at 77-78.

No. 80-1462

An additional element of vagueness in the "designed for use with drugs" standard is added by the fact that the manufacturer, not the retailer, designs the items sold. Consequently, the design intent of the manufacturer, not of the regulated seller, triggers the retailer's duty to obtain a license and the customer's obligation to sign a register available to the police.[18]

Next, we examine the phrase "*marketed* . . . for use with illegal cannabis or drugs" to determine whether the vagueness already noted can be eliminated. Defendants argue that the ordinance's reference to the *marketing* approach used by a retailer makes possible an inference about the seller's intent to sell a given item for use with illegal drugs.[19] Defendants argue that presuming that an item is intended for use with drugs from a retailer's marketing approach satisfies the test for the validity of a statutory presumption, specifically that

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[18] If this were a criminal ordinance, subjecting retailers and customers to prosecution based solely on the design intent of a third party, the manufacturer, there would be little question as to the law's invalidity. *See* note 9, *supra*.

[19] The following exchange took place during plaintiff's examination of Williams:

> Q Does your ordinance contemplate control or regulation of those things which you have defined in the guidelines under your words as "roach clips"?
>
> A The ordinance regulates paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs. It does not specifically state roach clips.
>
> Q I was referring to the guidelines which specifically says—
>
> A Those that are designed for use with illegal cannabis and drugs are therefore covered.
>
> Q What I am asking is how do you know what you are selling is a roach clip? The design you have agreed is the same. How does the individual, without the benefit of a policeman monitoring each and every item he sells, know whether or not it is a glove stretcher or a roach clip?
>
> A This is where the marketing concept enters in.

Transcript of March 23, 1979 at 78-79.

"there be a rational connection between the facts proved and the fact presumed." *Leary v. United States*, 395 U.S. 6, 33 (1969), quoting *Tot v. United States*, 319 U.S. 463, 467 (1943). Defendants' reliance on *Leary* is misplaced. In *Leary* the Court struck down a presumption that a person in possession of marijuana knows that the marijuana is of foreign origin.[20] The court held that despite the fact that most domestically consumed marijuana comes from abroad, 395 U.S. at 39-44, "it would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marijuana." 395 U.S. at 53. The issue in *Leary* was whether the "fact proved," (marijuana possession), and "fact presumed," (knowledge of importation), were rationally connected. But the issue here is whether the "fact proved," (marketing scheme), is too vague a standard to give rise to the "fact presumed," (drug-relatedness).[21] This vagueness issue is quite different from the "rational connection" issue in *Leary*.

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[20] Leary was convicted of violating 26 U.S.C. § 176a, which provided in relevant part:

> Notwithstanding any other provision of law, whoever, *knowingly*, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, *knowing the same to have been imported or brought into the United States contrary to law*, or whoever conspires to do any of the foregoing acts, shall be imprisoned. . . .
>
> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, *such possession shall be deemed sufficient evidence to authorize conviction* unless the defendant explains his possession to the satisfaction of the jury.

395 U.S. at 10 (emphasis added).

[21] Since we find that defendants have not adequately defined their "marketing concept" so as to give retailers fair notice of what the licensing ordinance requires of them, we do not reach the issue of whether, or what kind of, marketing factors can give rise to a presumption of intent for use with drugs.

No. 80-1462

The license guidelines purport to define the type of marketing approach that is indicative of the sale of items for use in conjunction with illegal drugs. For example, the guidelines indicate that ordinary pipes can be distinguished from drug-related pipes according to the pipes' proximity to nonwhite paper, roach clips, or literature encouraging illegal use of cannabis or drugs.[22] Similarly, "paraphernalia" is covered "if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs." The word "paraphernalia" is nowhere defined, but, as discussed earlier, the district court found that the word should be given its ordinary meaning of "articles of equipment." Thus, it appears that displaying almost any item in the proximity[23] of "literature encouraging illegal use of . . . drugs" requires the store to obtain a license and have purchasers sign the register. This means that paper clips sold next to *Rolling Stone* magazine conceivably could trigger the requirements of the ordinance. Perhaps the village would not construe the ordinance in this manner. But the point is that there is no way for a seller to determine which particular items or arrangement of merchandise will require a license.

Defendants argue that the phrase "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" adequately defines that has become known as drug paraphernalia,[24] so that a retailer in plaintiff's position

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[22] The guidelines state in part:

> Pipes—if displayed away from nonwhite paper or *tobacco oriented* paper, . . . are not covered;

(emphasis added). We assume that the guidelines mean that pipes are not covered if displayed away from *non*-tobacco oriented paper. This would be consistent with the guidelines on paper. However, read literally, the guidelines imply that pipes are "covered" if displayed near tobacco oriented paper, yet not covered if displayed only near white paper, even if it is white paper with "names oriented for use with illegal cannabis . . . ."

[23] The guidelines do not define "proximity".

[24] *See* note 14, *supra*.

can determine whether the ordinance applies to him. Defendants cite *McGowan v. Maryland*, 366 U.S. 420, 428 (1961), for the proposition that when a regulatory ordinance applies to a *retailer*, who has an opportunity for clarification prior to license application, problems of interpretation which might confuse ordinary citizens do not arise. In *McGowan*, which involved a statute that exempted from Sunday closing laws retail sales of "merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches and amusement parks, the Court stated:

> We believe that *business people* of ordinary intelligence in the position of appellant's employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county.

366 U.S. at 428 (emphasis added).

Despite the fact that "[i]n the field of regulatory statutes governing business activities where the acts limited are in a narrow category, greater leeway is allowed," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), this ordinance fails to satisfy the principles behind the vagueness doctrine. The greater leeway allowed when an ordinance is applied to a retailer, who supposedly is familiar with his industry, does not fit this case. The *McGowan* standard allows "ordinary commercial knowledge" or "reasonable investigation" to clarify the standards of an ordinance.[25] But to

[25] In *Tobacco Road v. City of Novi*, 490 F.Supp. 537 (E.D.Mich. 1980), a retailer was held to a higher standard of knowledge of paraphernalia than others, based on the passage from *McGowan* cited *supra*, and the court found that the ordinance was not vague as applied to retailers. 490 F.Supp. at 545-48. But an identical ordinance enacted in the city of Ferndale was later struck down in the same district in *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390 (E.D.Mich. 1980). In *Music Stop* the *McGowan* standard was also cited, and the court concluded that even if it imposed *McGowan's* "reasonable investigation" requirement on retailers, the ordinance was impermissibly vague. 488 F.Supp. at 393.

apply the *McGowan* analysis here would beg the question in issue. To apply that standard as defendants suggest would presuppose that the business the retailers are engaged in is the business of selling items "designed or marketed for use with illegal cannabis or drugs." The plaintiff vigorously contests that characterization of its business.

A further element of vagueness in the marketing concept arises from the danger of arbitrary and discriminatory enforcement by those charged with enforcement of the ordinance. *See Grayned*, 408 U.S. at 108-09. Since, as discussed above, the ordinance and guidelines are vague as to what constitutes items designed for use with illegal drugs, the ordinance is equally vague as to which supposedly designed-for-drug items will bring other items under the ordinance through the marketing proximity standard. If an item is not considered drug-related *per se*, then the subjective factors that enter into interpreting a retailer's marketing scheme make possible the dangers noted in *Housworth v. Glisson*, 485 F.Supp. at 38 (N.D.Ga. 1978), *aff'd*, 614 F.2d 1295 (5th Cir. 1980):

> Most people may agree that selling devices which have no obvious purpose other than to facilitate the use of dangerous drugs threatens the community's health, welfare and safety. But the decision of which devices fit this category becomes more difficult when something as innocuous and susceptible of legal or merely decorative use as a "marijuana pipe" is involved. Whether selling this merchandise falls within the ordinance's prohibition is a debatable question, *particularly when conflicting lifestyles and political views suffuse the decision maker's perception of what buyers will do with the product.*

(Emphasis added).

We find that there does exist a genuine danger that enforcement of this ordinance will be used to harass individuals choosing lifestyles and views different from those of the majority culture. Defendants may argue

that "conflicting lifestyles and political views" will not affect enforcement of the ordinance, but defendants already demonstrate a certain bias when they state in their brief "[d]efendant Village does expect that the marketing approach that encourages drug use by youth will be eliminated by responsible businesses and conducted under reasonable regulation by other businesses." Appellees' Brief at 11. Defendants obviously have concluded that no business which must be licensed under the ordinance is a "responsible business." Thus the ordinance is not, as the village argues, the same as the village's regulation of milk, flowers, and other activities requiring a license. Rather, the ordinance brands licensees as irresponsible businesses, a stigma which should not be applied according to the tastes of village officials who may be offended by a retailer's marketing approach. Thus, with regard to both the design and marketing standards, the ordinance "impermissibly delegates basic policy matters to [those charged with administering the ordinance] for resolution on an ad hoc and subjective basis." *Grayned*, 408 U.S. at 108-09.[26]

Another aspect of the ordinance which creates the danger of arbitrary enforcement, as well as failing to notify retailers of what the law expects of them, is Section 1(D) of the ordinance which provides:

> Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

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[26] The possibility that the enforcement standards may be clarified in the future by proceedings under the village's Administrative Procedures Ordinance does not cure the vagueness found here. *See* discussion in Part V of this opinion.

Defendants argue that this record-keeping requirement is supported by Illinois Revised Code ch. 56½, Section 1312, which requires that purchasers sign for Schedule V controlled substances.[27] But since possession or distribution of Schedule V substances is in itself illegal, except as authorized for medical purposes,[28] the Section 1312 register serves to detect illegal, non-medical use by purchasers or pharmacists. In the ordinance before us, however, the items to be regulated are, according to the ordinance itself, "legal retail items," unlike Schedule V substances. Nevertheless, the record-keeping section implies that a customer who purchases an item "designed or marketed for use with illegal cannabis or drugs" intends to *use* the item with illegal cannabis or drugs. A further implication could be that a customer is subject to police scrutiny or even to a search warrant on the basis of the purchase of a legal item.

The potential for abuse in inferring use or possession of drugs from purchase or possession of certain items was noted by the Eighth Circuit in *Geiger v. City of Egan*, 618 F.2d 26 (8th Cir. 1980). In *Geiger*, the court struck down a statute which made possession of a "drug-related device" a misdemeanor. The court stated:

> Where definite guidelines for enforcement officials are not present, use of the ordinance to expand arrest opportunities and justify searches magnifies the potential harm from enforcement of the ordinance.

618 F.2d at 29 (footnote omitted). The danger here is similar to the danger in *Geiger*. Here the danger of abuse arises from use of the police register, while in *Geiger* the danger arose from use of an arrest for possession of drug-related items as a basis for a search for controlled substances. While the ordinance here does not

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[27] Schedule V substances affected by Section 1312 include codeine, dihidrocodeine, and ethylmorphine. *See* ch. 56½, § 1212. There is no vagueness in the definition of these substances, unlike the definitions of the items to be regulated in the village's ordinance.

[28] *See* Ill.Rev.Stat. ch. 56½, §§ 1401, 1402, 1406.

make purchase of drug-related devices a criminal offense, the underlying problem of potential enforcement abuse arising from the registration requirement remains.[29]

V

Finally, defendants contend that the "licensing guidelines" represent only a beginning in clarifying what are "items. . . . designed or marketed for use with illegal cannabis or drugs." Defendants point to the village's Administrative Procedures Ordinance, No. 932-1977, which provides procedures for rule-making, including provisions for public comment on proposed rules, petition for adoption of new rules, and appeal of the adoption, amendment, or repeal of rules.[30]

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[29] On May 29, 1979, the parties entered a stipulation which provided in part:

> The primary purpose of that part of the challenged Ordinance, which requires that merchants maintain a police register or record of purchasers, of those items sought to be regulated, is to discourage persons in the Hoffman Estates community from purchasing those items. That the requirement that all purchasers of items sought to be regulated sign a police record, open to police inspection, serves to discourage customers, much the same way that requiring patrons of a motel to sign a guest register discourages certain persons from using the services of that type of establishment.

While the primary purpose of the registration requirement may well be to discourage purchase of certain items, we are not convinced that the danger of unjustified searches and arrests noted in *Geiger* is not present here.

[30] The relevant sections of the Administrative Procedures Ordinance deal with the procedures for rule-making, petition for adoption of rules, and appeal, and are set out as follows:

> Sec. 5-8-4—Procedure for rule-making:
>
> (A) Prior to the adoption, amendment or repeal of any rule, each Department shall:
>
> (1) Give at least 10 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of

(Footnote continued on following page)

No. 80-1462

Presumably speaking of rules the village may adopt in the future pursuant to its Administrative Procedures Ordinance, defendants state, "[w]hile speculative, it is likely the guidelines in the Model Act . . . would be used to identify the design and marketing intent."[31]

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[30] *continued*

the subjects and issues involved, and the time, place and manner in which interested persons may present their views concerning the intended action. The notice shall be mailed to each person who has made timely request of the Department for advance notice of its rule-making proceedings.

(2) Afford all interested persons reasonable opportunity to submit data, views or arguments, which may, in the discretion of the Department be submitted either orally or in writing or both. The Department shall consider fully all submissions respecting the proposed rule.

. . .

Sec. 5-8-6—Petition for adoption of rules: Any interested person may petition a Department requesting the promulgation, amendment or repeal of a rule. Each Department shall prescribe by rule the form for petitions and the procedure for their submission, consideration and disposition. If, within 30 days after submission of a petition, the Department has not initiated rule-making proceedings in accordance with Section 5-8-4 of this Article, the petition shall be deemed to have been denied.

Sec. 5-8-7—Appeals: Any person aggrieved by the adoption, amendment or repeal of any rule under the procedures herein may request that the Village Manager place the issue before the appropriate committee of the Village Board. There shall be an opportunity for the aggrieved person or persons and the Department to present the merits of the issue before the Committee. The Committee shall make a recommendation to the Village Board. The Village Board shall resolve the issue by Resolution or Ordinance, as appropriate.

[31] As discussed in Part II, the Model Act is a criminal statute. In addition to providing guidelines for determining whether an object is drug paraphernalia, the Model Act requires proof of intent or knowledge by a seller that an item will be used as drug paraphernalia. Furthermore, while the Model Act has been approved by some courts, its constitutionality is not before this court

Appellees' Br. at 7. But the mere possibility that the vagueness in this ordinance might later be corrected by additional guidelines certainly cannot be a sound basis for holding it constitutional.

As discussed in Part IV, this ordinance is impermissibly vague on its face. Therefore, it does not provide an administrative body with adequate standards to guide and limit the administrators' discretion in drawing guidelines. "Further, where, as here, a rule contains no ascertainable standards for enforcement, administrative and judicial review can be only a meaningless gesture." *Bence v. Breier*, 501 F.2d 1185, 1190 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975). In addition, the possibility that plaintiff itself may appeal or propose new guidelines under the Administrative Procedures Ordinance does not shift the burden to plaintiff to ensure that the village adopts rules with ascertainable standards.

As stated in *Grayned*, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." 408 U.S. at 108. This ordinance and the existing guidelines fail to adequately define the items to be regulated, and thus a retailer in plaintiff's position is unable to determine what the law expects of him. Thus, this ordinance must be declared void for vagueness.[32] Since we find this ordinance void for vagueness, it is unnecessary to reach plaintiff's other constitutional claims, and we express no opinion on them.

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[32] After this opinion was written, but before it was released, the Sixth Circuit issued its opinion in *Record Revolution No. 6, Inc. v. City of Parma*, No. 80-3308 (6th Cir. Dec. 8, 1980). The Sixth Circuit held three ordinances based on the Model Act to be unconstitutional. That opinion, like our opinion here, found the "designed for use" standard unconstitutionally vague.

No. 80-1462

The order of the district court is

REVERSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4969—Midwest Law Printing Co., Inc., Chicago—1-12-81—350

OPINION OF THE DISTRICT COURT

Seller of records, tobacco-use related items, etc., sued village and others seeking declaration that village drug paraphernalia ordinance was unconstitutional. The District Court, Leighton, J., held that: (1) considering contemporaneously adopted guidelines, together with terms used, operative words of the ordinance, which regulated the sale of an item, effect, paraphernalia or thing which is designed or marketed for use with illegal cannabis or drugs, were not unconstitutionally vague; (2) ordinance, which required a license, which, inter alia, prohibited employment of anyone convicted of drug-related offenses and which required seller to record to whom subject items were sold and prohibited sales to minors, did not violate First Amendment rights; (3) ordinance was not overbroad, and (4) ordinance did not violate equal protection as it bore a rational relationship to legitimate governmental purpose of controlling use of cannabis and other illegal drugs.

Judgment for defendants.

Memorandum

LEIGHTON, District Judge

This suit is against a village, several of its officials, and its trustees, for injunctive relief, damages, and a judgment declaring that a certain village ordinance is unconstitutional. Jurisdiction of this court is invoked under 28 U.S.C. §§ 1331, 1343(3) and (4). The ordinance in question requires that any person who, within the village, sells an item, effect, paraphernalia or thing which is designed or marketed for use with illegal cannabis or drugs must obtain a license for $150.00, file affidavits averring that the intended licensee and its employees have never been convicted of a drug related offense, and keep records which on inspection will disclose to the police each item sold and to whom. The sale of such items to minors is prohibited; and the ordinance provides for a fine of not less than $10.00 and up to $500.00 for any violation of its terms.

Plaintiff alleges in its complaint that this ordinance is vague, overbroad, capable of being arbitrarily enforced, and not reasonably related to any legitimate governmental objective of the village in controlling drug abuse. It claims that enactment and enforcement of the ordinance will deprive plaintiff of rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and that the terms of the ordinance when applied to the plaintiff violate the First Amendment and the commerce clause of the Constitution. On filing of its suit, plaintiff moved for a preliminary injunction which after a hearing the court denied. Then the cause was tried without a jury on the presented evidence and stipulated testimony. The following are the material facts.

I.

The plaintiff in this case is Flipside, Hoffman Estates, Inc., an Illinois corporation engaged in interstate commerce as Flipside Records, 2348 West Higgins Road in the village of Hoffman Estates, Illinois. Defendants are the village, an Illinois home rule municipality that has a population of approximately 37,000; and in their individual as well as official capacities, Virginia M. Hayter, village president; Richard Williams, village attorney; John O'Connell, village chief of police; William W. Cowin, William A. Palmer Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor, Lee Dogion, village trustees.

For more than three years prior to May 1, 1978, plaintiff sold phonograph records, tapes, record accessories, novelty devices, and jewelry. In addition, it sold literature that included "A Child's Garden of Grass", "Marijuana Grower's Guide", and magazines such as "National Lampoon", "Rolling Stone", and "High Times". The novelty devices and tobacco-use related items plaintiff displayed and sold in its store ranged

from small commodities such as clamps, chain ornaments, and earrings through cigarette holders, scales, pipes of various types and sizes, to large water pipes, some designed for individual use, some which as many as four persons can use with flexible plastic tubes. Plaintiff also sold a large number of cigarette rolling papers in a variety of colors. One of plaintiff's displayed items was a mirror, about seven by nine inches with the word "Cocaine" painted on its surface in a purple color. Plaintiff sold cigarette holders, "alligator clips", herb sifters, vials, and a variety of tobacco snuff.

The defendant village, for a long time prior to the date of this controversy, regulated more than 80 items or businesses, including florists, grocers and other merchants. Licensing of the sale of these items was governed by a municipal code which on October 3, 1977 was amended to provide for an administrative review procedure within the village. Under this amendment, the action of any village department could on request of an aggrieved person be placed on the agenda of an appropriate committee for review.

On February 20, 1978, an authorized quorum of the village trustees acted on the following proposal.

ORDINANCE NO. 969—1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8—7—16, which additional section shall read as follows:

Sec. 8—7—16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8—1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8—7—16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the licensee's sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8—2—1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs $150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offenses and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

The ordinance was adopted, effective May 1, 1978. To it was attached the form of affidavit which an applicant for the required license was to execute concerning absence of any conviction of a drug related offense. The form of record which had to be kept showing sales of items designed or marketed for

use with illegal cannabis or drugs was also attached to the enactment. A short time later, before the suit in this case was filed, the village attorney prepared a set of license guidelines which became an integral part of the ordinance.

> LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS
>
> Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.
>
> Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.
>
> Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.
>
> Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

Soon after the enactment of the ordinance, plaintiff was notified that it was subject to the terms of the ordinance, and that sales of the items covered without complying with the terms would be a violation and subject plaintiff to its penalties. A copy of the ordinance and the guidelines were available to the plaintiff and those who protected its interests. Plaintiff chose not to apply for the license required. Instead, acting through its agents and employees, it elected to remove from the shelves of its store more than eighty items which were believed to fall within the terms of the ordinance. Then plaintiff, on May 30, 1978, filed this suit alleging that the ordinanace in question

was vague and thus void; that its terms violated Article I of the Constitution of the United States in that it interferred with the plaintiff's business; that the ordinance violated the commerce clause of the federal Constitution and deprived plaintiff of rights secured to it by the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. Plaintiff prayed that this court restrain defendants from enforcing Ordinance No. 969—1978, Section 8—7—16, and that this court declare in a judgment that the ordinance was violative of the constitutional protections alleged by plaintiff and thus was void and unenforceable. Defendants' answer denied plaintiff's allegations and its claims for relief. In post-trial briefs, the parties have submitted their arguments and contentions on the issues presented.

II.

A.

The first issue is whether the ordinance in question is vague, and thus its application to the plaintiff and its business violates the due process clauses of the Fifth and Fourteenth Amendments to the Constitution. Vague laws offend several important values in our society. *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). They may trap the innocent by not providing fair warning; they may fail to provide explicit standards for those who apply them; they impermissibly delegate basic policy matters for resolution on an *ad hoc* and subjective basis, with attendant dangers of arbitrary and discriminatory application. *Id.* at 108, 92 S.Ct. at 2298.

A law may run afoul of the vagueness doctrine even though it does not impose criminal sanctions because the fundamental defect is not the penalty but rather "the exaction of obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co. v. American Sugar Refining Co.,* 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 597 (1925); *see Horn v. Burns and Roe,* 536 F.2d

251 (8th Cir. 1976). Accordingly, the due process clause of the federal Constitution requires that civil and criminal enactments, and regulations promulgated pursuant thereto, be sufficiently clear that persons who are affected can gain a reasonably clear idea of what the law requires of them. *Franklin v. First Money, Inc.*, 427 F.Supp. 66, 67 (E.D.La.1976), *aff'd*, 599 F.2d 615 (5th Cir. 1979). In determining whether a legislative enactment meets these requirements the same rules of construction are used whether it is a statute or ordinance. *Martin v. King*, 417 F.2d 458, 461 (10th Cir. 1969).

This prohibition against vagueness does not invalidate every ordinance which a court believes could have been drafted with greater precision. Many ordinances will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties". *Robinson v. United States*, 324 U.S. 282, 286, 65 S.Ct. 666, 668, 89 L.Ed. 944 (1945). All the due process clause requires is that a law should give warnings sufficient to enable a person, in the conduct of his or her affairs, to avoid that which is forbidden. *Rose v. Locke*, 423 U.S. 48, 50, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975). Therefore, a statute or ordinance is unconstitutionally vague when it fails to give fair notice of what it prohibits. *State v. Zwicker*, 41 Wis.2d 497, 164 N.W.2d 512, *appeal dismissed* 396 U.S. 26, 90 S.Ct.199, 24 L.Ed.2d 147 (1969).

However, in determining whether a statute or ordinance is vague, a court should bear in mind that "[t]he Office of Judges is always to make such construction as to suppress the Mischief [which is the object of the law] and advance the Remedy; and to suppress subtle Inventions and Evasions for Continuance of the Mischief." *Heydon's Case*, 3 Co. 7a, 7b *Magdalon College Case*, 11 Co. 66b, 73b, *quoted in United States v. Second National Bank of North Miami*, 502 F.2d 535, 541 (5th Cir. 1974), *cert. denied* 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1975); *see Mason v. Cutkomp*, 15 Ill.App.2d 378, 146 N.E.2d 382 (1957). When faced with the question whether words of a

statute or ordinance are of sufficient clarity, a court must first look to the language of the law itself. *Higgins v. Marshall,* 190 U.S.App.D.C. 54, 584 F.2d 1035, 1037 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 931, 99 S.Ct. 2051, 60 L.Ed.2d 659 (1979). All laws should receive a sensible construction. *Cartledge v. Miller,* 457 F.Supp. 1146, 1158 (S.D.N.Y.1978). Where there is no accumulation of jurisprudence on the actual meaning of the words used in an enactment, and the terms are not defined, a court must assume that those who used the words did so intending them to have the meaning commonly and ordinarily understood. *United States v. Porter,* 591 F.2d 1048, 1053 (5th Cir. 1979).

In the case at hand, the parties agree that the ordinance with which they are concerned is a regulation enacted by an Illinois home rule municipality, and that the subject matter sought to be regulated is properly within the municipal police power. The required annual license fee of $150.00 is a charge calculated to furnish funds necessary to administer the ordinance. It is expected that fines which will range from $10.00 to $500.00 for each violation will effectuate its enforcement. By its terms, the ordinance applies only to the sale of "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes . . .". The statutes referred to are ch. 56½ §§ 703(a), 1102(g), Ill. Rev. Stat. (1977).

It is obvious that this ordinance is not a model of legislative clarity; defendants do not claim that it is. Its purpose, nonetheless, is evident. It prohibits the sale or gift of the items covered to any minor; and it appears from the evidence that when it was adopted, those who drafted it, proposed it, and voted on it, intended it as a means of coping with the social problem of drug abuse in this small community located within the greater Chicago metropolitan area. The operative words are not defined, but there is no indication that the crucial words "items," "effect," "paraphernalia," "accessory," or "thing" are

to be given a technical meaning; they are, in fact, ordinary words. In the construction of statutes and ordinances, absent some established technical definition, the words used must be given their common ordinary meaning, *Sheehan* v. *Scott,* 520 F. 2d 825, 829 (7th Cir. 1975), unless the clear intent of the enacting body requires otherwise. *Schreibman* v. *L. I. Combs & Sons, Inc.,* 337 F.2d 410, 412 (7th Cir. 1964); 82 C.J.S. Statutes § 329; 73 Am.Jur.2d Statutes § 206.

There is no guidance from court decisions, no accumulation of jurisprudence, on the actual meaning of the crucial words of this ordinance, particularly in the context of what is now known as drug paraphernalia enactments. *See* Note, *Paraphernalia for Marijuana and Hashish Use: Possession Statutes and Indiana's Pipe Dream,* 10 Val. Univ.L.Rev. 353 (1976). However, reference can be made to a dictionary. *See Heyen* v. *Willis,* 94 Ill.App.2d 290, 236 N.E.2d 580 (1968); *Nomura (America) Corp.* v. *United States,* 299 F.Supp. 535 (Cust. Ct. 1969), *aff'd,* 435 F.2d 1319, 58 CCPA 82 (1969); 73 Am.Jur.2d Statutes § 223. When this is done Webster's Third New International Dictionary (Unabridged ed. 1971) tells us at p. 1203, that "item" (the ordinance uses the plural) means "something produced by manufacturing or manual labor or in some other way: a piece of goods . . ."; at p. 724, that "effect" means "movable property: goods (such as clothing, jewelry, and other personal property)"; at p. 11, that "accessory" means "an object or device that is not essential in itself but that adds to the beauty, convenience or effectiveness of something else . . ."; and at p. 2376, that "thing" means "possessions, goods: whatever may be possessed or owned or be the object of a right; such as equipment or utensils especially for a particular purpose."

As to the word "paraphernalia", one court has said that it "is not a technical word in the law of crimes, although it may be in the law of property. The word is a word in common usage. Roget's Thesaurus defines it as a noun, plural, meaning belong-

ings, equipment, accessories." *People* v. *Watkins,* 126 Cal. App.2d 199, 271 P.2d 641, 64[illegible] (1954). To those persons who would purchase "paraphernalia . . . designed or marketed for use with illegal cannabis or drugs . . .", within the meaning of the subject ordinance, the word "paraphernalia" is becoming an accepted term. The Court of Appeals for the 8th Circuit has had occasion to observe that "in recent years 'paraphernalia' has become a standard vocabulary word in the vernacular of the drug community, including both drug users and drug enforcement personnel." *United States* v. *Johnson,* 541 F.2d 1311, 1315 (8th Cir. 1976). Webster tells us, at p. 1638 that "paraphernalia" means "articles of equipment . . .".

Plaintiff attaches importance to the testimony of the village attorney who drafted the subject ordinance. It points to several of his statements and argues that they show that not even he knew the meaning of the words used in the village enactment. For example, plaintiff calls attention to the fact that in explaining whether he thought any specific article fell within the ordinance, the attorney said, "[I]t would be up to a police officer to tell me whether they had been designed or used . . .". In this court's judgment, these portions of the village attorney's testimony are taken out of context. At the time he answered the question referred to, he was explaining his dependence on police officers telling him in what manner items potentially within the terms of the ordinance were displayed in a particular store. Thus, the village attorney was explaining his views concerning enforcement of the ordinance, and his dependence on the report of a police officer.

Reliance is also placed on the testimony of the village president, who, the plaintiff contends, revealed an inability to define or describe what items were regulated or prohibited by the subject ordinance. However, the complete testimony of this witness shows she was not an expert on the questions involved. As she explained, her actions in this matter were based on knowledge of drug paraphernalia she acquired from people

who knew the subject. It is obvious from the testimony of this witness that when she voted to adopt the subject ordinance she and her fellow trustees relied on the knowledge of persons acquainted with the problem about which they were legislating. More important, however, is the fact that the time plaintiff was told the ordinance was in effect, there was a set of guidelines which could be used in determining whether it applied to a particular business. In addition, the village trustees had enacted an administrative review ordinance which furnished a means by which any applicant for a license could have a hearing if there was any disagreement about the applicability of the ordinance to a particular item or business.

The guidelines adopted almost contemporaneously with the ordinance, together with the terms used, lead this court to conclude that the operative words of the ordinance under attack are not vague. They are common, ordinary expressions, the meaning of which is known to everyone familiar with the English language. They are sufficiently clear that all persons that acted for and on behalf of the plaintiff could gain a reasonably clear idea of what the ordinance required of anyone who desired, within the village, to sell "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs . . .".

Proof that these conclusions are valid is best shown by the conduct of those who acted on plaintiff's behalf. As soon as they were advised that the subject ordinance was in force, they unerringly went to the shelves in plaintiff's store and removed all items they thought fell within the ban of the new law, a total of 72. The court has examined each; they are described in the record of this case. Their removal from the shelves of plaintiff's store successfully placed it in compliance with the ordinance. Defendants concede that plaintiff no longer is selling any "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes . . .". Obviously,

plaintiff was not hampered by any vagueness in the words of the subject ordinance.

B.

The second issue is whether, as plaintiff contends, the ordinance in question is violative of rights protected by the First Amendment to the federal Constitution. In an extensive brief, citing the leading First Amendment decisions of the United States Supreme Court, plaintiff argues that enforcement of this ordinance against it will have a chilling effect on its sale and distribution of literature, and that enforcement of the ordinance will restrict its design and marketing strategies which plaintiff contends constitute protected commercial speech.

These arguments are highly sophisticated, indeed ingenious, but defendants meet them with the blunt assertion that the subject ordinance does not present any First Amendment question. In no way, they argue, does this ordinance speak to matters of literature or speech. Defendants point out that as an aid to identification of marketing intent, the village attorney provided guidelines which made it clear that if the items covered by the ordinance were displayed with drug oriented literature, the marketing intent would be evident; and therefore, the presumption applied in *Leary v. United States,* 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) would be stronger. Even then, say defendants, neither the ordinance nor the guidelines are intended to regulate or limit plaintiff's First Amendment rights.

This court agrees with defendants. The ordinance in question does not purport to prohibit advertisement or the expression of commercial ideas as in *Record Museum v. Lawrence Township,* 481 F.Supp. 768 (D.N.J.1979), and in *Bambu Sales, Inc. v. Gibson,* 474 F.Supp. 1297 (D.N.J.1979). Even in the case of a state criminal statute, the mere allegation of a "chilling effect" on First Amendment rights is not sufficient to

warrant the exercise of this court's equitable powers to restrain enforcement of an ordinance. *Younger v. Harris,* 401 U.S. 37, 42, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Record Head Inc. v. Olson,* 476 F.Supp. 366, 372 (D.N.D.1979).

The ordinance defines the scope of the items regulated by the manner in which they are designed or marketed. As plaintiff points out, recent Supreme Court decisions establish that commercial speech is not "wholly outside the protection of the First Amendment." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S. 748, 761, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976). However, these same decisions emphasize that commercial speech that is false, deceptive, or proposes illegal activity may be regulated or prohibited. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics . . .".) *See Friedman v. Rogers,* 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979); *Bates v. State Bar of Arizona* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Linmark Associates v. Township of Willingboro,* 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). The ordinance presented here is narrowly drawn to limit only the sale of items "marketed for use with illegal cannabis or drugs." Thus, even assuming that marketing is a form of advertising entitled to some degree of First Amendment protection, the restriction applied by this ordinance does not infringe on any protected First Amendment activity. Even if it did, the area of First Amendment freedoms can within narrow limits be subjected to regulation imposed by a reasonable licensing ordinance. *Universal Film Exchanges, Inc. v. City of Chicago,* 288 F.Supp. 286 (N.D.Ill. 1968); *Pent-R-Books, Inc. v. United States Postal Service* 328 F.Supp. 297 (E.D.N.Y. 1971).

C.

Nor is the subject ordinance overbroad, as plaintiff claims. The concept of "overbreadth" applies where the language of a statute or ordinance, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution. *Landry v. Daley,* 280 F.Supp. 938, 951 (N.D.Ill.1968) *appeal dismissed,* 393 U.S. 220, 89 S.Ct. 455, 21 L.Ed.2d 392, *rev'd* 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); *Overstock Book Co. v. Barry,* 305 F.Supp. 842 (E.D.N.Y.1969), *aff'd,* 436 F.2d 1289 (2nd Cir. 1970); *Medrano v. Allee,* 347 F.Supp. 605 (S.D.Tex.1972) *affirmed in part, vacated in part, and remanded,* 416 U.S. 802, 94 S.Ct. 802, 40 L.Ed.2d 566 (1974). The doctrine embodies the constitutional principle that governmental purpose to control or prevent activities may not be achieved by means which sweep unnecessarily broadly and thereby invade areas of protected freedoms. *People v. Dominick,* Co.Ct., 326 N.Y.S.2d 466, 472 (1971). As discussed above, this ordinance does not invade any areas protected by the First Amendment. Also, the ordinance is not a criminal ordinance, unlike the one considered in *Bambu Sales, Inc. v. Gibson,* 474 F.Supp. 1297 (D.N.J.1979); *see* Annot. 92 A.L.R. 47. As further pointed out below, in the discussion of the equal protection issues raised by the plaintiff, the village does have a legitimate interest in controlling the growing use of illegal drugs, and regulating the sale of drug paraphernalia is a rational way of furthering that interest. Considering this, the language of the ordinance is carefully designed to reach only that activity which the village may legitimately regulate—the sale of paraphernalia designed or marketed for use with illegal drugs. Plainly, by no construction of the Constitution has the plaintiff any right to sell, either in the village of Hoffman Estates or anywhere else, any "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs . . .". The ordinance does not regulate any activity beyond this, and thus is not overbroad.

D.

The final issue to be resolved is whether the subject ordinance, as claimed by plaintiff, is violative of the equal protection clause of the Fourteenth Amendment. Plaintiff argues that the ordinance infringes on the fundamental right of free speech without the showing of a compelling state interest justifying its enforcement; that on its face, the ordinance is arbitrary and irrational in that the classification it creates has no rational relation to a legitimate governmental purpose delagated to the enacting village; and that the ordinance violates the equal protection clause because its terms promote discriminatory enforcement with attendant dangers of arbitrary application.

Defendants agree with plaintiff that the objectives of their ordinance must bear a rational relationship to a legitimate state purpose; and that discriminatory enforcement of the law can result in violation of equal protection since administrative classifications can give rise to equal protection claims. They point, however, to plaintiff's concession that the village, within its jurisdiction, has an interest in preventing the use of cannabis and other illegal drugs. They disclaim the belief that such prevention will be accomplished merely through enforcement of an ordinance; but they express the expectation that enforcement of this ordinance will prevent convicted drug dealers and users from selling drug paraphernalia within the village, and thereby gaining contacts with a ready market. Defendants argue that the marketing approach and the sale of drug paraphernalia both encourage drug use by youths and that this encouragement will be tempered by the ordinance through the requirement that responsible businesses be conducted under a reasonable license requirement. These objectives, defendants insist, are rational interests, consistent with the health and safety concerns of the village community. To this end, the regulation imposed on plaintiff by the ordinance comports with

the same reasonableness that justifies the licensing and regulation of 80 other businesses by the Village of Hoffman Estates.

Again, the court is constrained to agree with defendants. Legislative enactments are presumed valid unless it is shown that the statute or ordinance in question bears no rational relationship to a legitimate legislative purpose. *Williamson* v. *Lee Optical, Inc.*, 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955); *United States* v. *Kiffer*, 477 F. 2d 349 (1973), *cert. denied*, 414 U. S. 831, 94 S. Ct. 62, 38 L. Ed. 2d 65. Of course, a stricter standard of review is required where the enactment infringes upon the exercise of a fundamental right. *Roe* v. *Wade*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). However, as decided above, the ordinance does not infringe on any First Amendment right of the plaintiff. Furthermore, there is no conceivable colorable claim of a fundamental constitutional right to sell items which facilitate and encourage the use of illegal drugs. Thus, the ordinance does not violate the equal protection clause if it bears a rational relationship to a legitimate governmental purpose.

Controlling the use of cannabis and other illegal drugs is clearly a legitimate, even compelling, interest of the village of Hoffman Estates. The objectives of the defendants in enacting this ordinance, to prevent convicted drug dealers and users from selling drug paraphernalia and gaining contacts with a ready market, to prevent a marketing approach which encourages and facilitates illegal drug use, and to require that these items be sold by responsible businesses which are reasonably licensed, are rationally related to the compelling interest in controlling drug abuse, well within the proper health and safety concerns of the village.

III.

For these reasons, it is this court's judgment that on its face and in its application to the plaintiff in this case, the Flipside,

Hoffman Estates, Inc., an Illinois corporation, Ordinance No. 969-1978, Municipal Code of the Village of Hoffman Estates, is a valid and constitutional municipal enactment. Therefore, plaintiff is not entitled to injunctive relief, damages, nor to a declaration that the ordinance is unconstitutional. Judgment will be entered in favor of the defendants, each of them; and against the plaintiff. The clerk is ordered to make an appropriate judgment entry in accordance with Rule 58(1), Federal Rules of Civil Procedure.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 5, 1981.

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. GEORGE TEMPLAR, Senior District Judge*

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation, Plaintiff-Appellant,

No. 80-1462 *vs.*

VILLAGE OF HOFFMAN ESTATES, et al., Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 C 2114

George N. Leighton, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendants-appellees, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Senior District Judge George Templar from the District of Kansas is sitting by designation.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT FROM AN ORDER OF THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

File Number 80-1462

The Flipside, Hoffman Estates, Inc., an Illinois corporation, *Plaintiff-Appellant,* *vs.* Village of Hoffman Estates, et al., *Defendants-Appellees.*	Notice of Appeal

Notice is hereby given that Village of Hoffman Estates, et al, defendants above named, hereby appeal to the United States Supreme Court from the order entered by the United States Court of Appeals for the Seventh Circuit in this action on the 5th day of February, 1981, and the opinion rendered by said Court on the 12th day of January, 1981, upon the basis that said order and opinion was contrary to the Fourteenth Amendment of the Constitution of the United States.

RICHARD N. WILLIAMS
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1200 North Gannon Drive
Hoffman Estates, IL 60196
(312) 882-9100
Attorney for Village of Hoffman Estates

ORDINANCE NO. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16— ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:
It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs	$150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

Section 4: That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5: That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.

PASSED this 20th day of February, 1978

APPROVED this 20th day of February, 1978.

VOTE: AYES 3 NAYS 3 ABSENT 0
President Hayter voted aye.

APPROVED:

Virginia M. Hayter
Village President

ATTEST:

Regina F. Geck
Deputy Village Clerk

RECENT DRUG PARAPHERNALIA CASES

Four recent decisions have upheld the Model Act in its entirety. *Mid-Atlantic Accessories Trade Assoc.* v. *Maryland,* 500 F. Supp. 834 (D. Md.—1980); *Florida Businessmen for Free Enterprise* v. *City of Hollywood,* No. 80-6157-Civ-NCR (S. D. Fla. Aug. 29, 1980); *Delaware Accessories Trade Assoc.* v. *Gebelein,* No. 80-285 (D. Del. Aug. 15, 1980); and *World Imports, Inc.* v. *Woodbridge Township,* No. 80-1414 (D. N. J. June 8, 1980). One other decision has also found the Model Act to be constitutional. *The Casbah, Inc.* v. *Thone,* No. 80-0271 (D. Neb. Sept. 26, 1980). Very recently, the Louisiana statute, which is derived in substantial part from the Model Act, was found to be constitutional. *Tobacco Accessories* v. *Treen,* Civil No. 80-3372 (E. D. La. Oct. 28, 1980). Thus, there are six recent Federal District Court decisions which have upheld the constitutionality of the Model Act in its entirety or in substantial part.

In addition, there are many reported decisions upholding drug paraphernalia statutes which were not based on the Model Act. These include *Record Head Inc.* v. *Olson, supra; Florida Businessmen for Free Enterprise* v. *State of Florida,* No. TCA 80-0954 (N. D. Fla. Sept. 30, 1980); *Levas* v. *Village of Antioch,* No. 80-C-1574 (N. D. Ill. Apr. 22, 1980); *Magnani* v. *City of Ames,* No. 80-229A (S. D. Iowa—1980); *Cardarella* v. *City of Overland Park,* No. 86246 (Johnson County, Kans., Dist. Ct. Dec. 3, 1979), and *Tobacco Road* v. *City of Novi,* No. 79-71000 (E. D. Mich. June 21, 1979).

Other decisions have held state statutes not based on the Model Act to be unconstitutional in whole or in part. These include *Geiger* v. *City of Eagen,* 618 F. 2d 26 (8th Cir. 1980); *High Ol' Times, Inc.* v. *Busbee,* 621 F. 2d 135 (5th Cir. 1980); *Knoedler* v. *Roxbury Township,* 485 F. Supp. 990 (D. N. J. 1980); *Record Museum* v. *Lawrence Township,* 481 F. Supp.

768 (D. N. J. 1979); *Bambu Sales, Inc.* v. *Gibson*, 474 F. Supp. 1297 (D. N. J. 1979); *Record Head Corp.* v. *Sachen*, No. 80-C-639 (E. D. Wisc. Sept. 30, 1980); *Smith* v. *Roark*, No. 80-2110 (S. D. W. Va., May 13, 1980); *Hejira Corp.* v. *Mac Farlane*, No. 80-F-824 (D. Colo. Sept. 5, 1980) ; *Florida Businessmen for Free Enterprise* v. *Pinellas County*, No. 80-482 (M. D. Fla. May 15, 1980); *Music Stop, Inc.* v. *City of Ferndale*, 488 F. Supp. 390 (E. D. Mich, 1980); and *Indiana Chapter, NORML, Inc.* v. *Sendak*, No. TH 75-142-C (S. D. Ind. Feb. 4, 1980).

Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
ILLINOIS, et al.

Appellants,

v.

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
an Illinois Corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

RICHARD N. WILLIAMS
Village of Hoffman Estates
1200 North Gannon Drive
Hoffman Estates, IL 60196
(312) 882-9100

Counsel for Appellant

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Jenkins & Pritzker
134 N. LaSalle Street
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Chicago, Illinois 60602
(312) 372-2225

APPEAL DOCKETED APRIL 3, 1981
PROBABLE JURISDICTION NOTED JUNE 1, 1981

Pandick Press Midwest, Inc., Chicago • 454-7600

TABLE OF CONTENTS

	PAGE
1. Plaintiff's Complaint	1
2. Defendants' Answer	15
3. Order denying Preliminary Injunction	17
4. Stipulations of Parties	18
5. Transcript Excerpts	38
6. Order Entering Judgment for Defendants	88
7. Petition for Rehearing	89
8. Petition to Reconsider	96
9. Transcript of Proceedings	99
10. Judgment Denying Petition for Rehearing	108
11. Notice of Appeal to the Seventh Circuit	110
12. Notation of Items Found in Jurisdictional Statement	111

IN THE UNITED STATES DISTRICT COURT

For The Northern District of Illinois

Eastern Division

THE FLIPSIDE, HOFFMAN ESTATES, INC., AN ILLINOIS CORPORATION,
Plaintiff

vs. No.

VILLAGE OF HOFFMAN ESTATES, Illinois, a Municipal Corporation; VIRGINIA M. HAYTER, individually and in her official capacity as President of the Village of Hoffman Estates, Illinois; RICHARD WILLIAMS, individually and in his official capacity as Attorney for the Village of Hoffman Estates, Illinois; JOHN O'CONNELL, individually and in his official capacity as Chief of Police for the Village of Hoffman Estates, Illinois; and the following, individually, and in their official capacity as Trustees for the Village of Hoffman Estates, Illinois; WILLIAM W. COWIN, WILLIAM A. PALMER, BRUCE C. LIND, RALPH H. LYERLA, THOMAS W. TAYLOR and LEE DODGION,
Defendants

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF, AND FOR DAMAGES PURSUANT TO 42 U.S.C. 1983
(Filed May 30, 1978)

Comes Now the Plaintiff, THE FLIPSIDE, HOFFMAN ESTATES, INC., by and through its attorneys, Michael L. Pritzker, Marvin

Leavitt, R. Brent Daniel and Pritzker and Glass, Ltd., and complaining of the Defendants, Village of Hoffman Estates, Virginia M. Hayter, William W. Cowin, William A. Palmer, Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor, Lee Dodgion, Richard Williams, John O'Connell and each of them, represents and alleges:

THE PARTIES

1. The Plaintiff, The Flipside, Hoffman Estates, Inc., is a corporation duly licensed by the State of Illinois, doing business within the Northern District of Illinois, one store being located at 2348 West Higgins Road, in the Village of Hoffman Estates, State of Illinois.

2. The Village of Hoffman Estates is a Municipal Corporation located in the County of Cook, State of Illinois.

3. The Defendant, Virginia M. Hayter was the President of the Village of Hoffman Estates, State of Illinois, at all times herein alleged.

4. The Defendant, Richard Williams, was the attorney for the Village of Hoffman Estates, State of Illinois, at all times herein alleged.

5. The Defendants, William W. Cowin, William A. Palmer, Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor, and Lee Dodgion, were trustees of the Village of Hoffman Estates, State of Illinois, at all times herein alleged.

6. The Defendant, John O'Connell, was the Chief of police of the Village of Hoffman Estates, State of Illinois at all times herein alleged.

JURISDICTION

1. This action arises under the Constitution of the United States, Specifically; the First Amendment; the Fourth Amendment; the Fifth Amendment; the Eighth Amendment; the Fourteenth Amendment; Article I, Section 8, Clause 3; the Commerce Clause of the Constitution of the United States; and Article I, Section 10, of the Constitution of the United States.

2. The Plaintiff, The Flipside, Hoffman Estates, Inc., seeks a declaratory judgment that the Village of Hoffman Estates, Ordinance No. 969-2978, Section 8-7-16 is unconstitutional; and further seeks a Temporary Restraining Order, a Preliminary Injunction, and a Permanent Injunction prohibiting application and enforcement of said Ordinance by the above-named Defendants, and all other agents, officers, servants, employees, and attorneys of the Village of Hoffman Estates, State of Illinois.

3. The Plaintiff, The Flipside, Hoffman Estates, Inc., further seeks relief pursuant to 42 U.S.C. 1983, for Defendants' actions under color of law which caused the Plaintiff to be deprived of rights, secured to it by the Constitution of the United States.

4. The Plaintiff, The Flipside, Hoffman Estates, Inc., alleges that due to the wrongful acts of the Defendants, and each of them, it will suffer extreme hardship, irreparable injury, and that there exists no complete and adequate remedy at law.

5. That the Plaintiff, The Flipside, Hoffman Estates, Inc., alleges that the amount in controversy exceeds ten thousand dollars ($10,000.00) exclusive of interests and costs.

Accordingly, this is an action in equity with jurisdiction conferred upon this Honorable Court pursuant to 28 U.S.C. § 1331; 28 U.S.C. § 2201 and 2202 and 28 U.S.C. § 1343.

VENUE

1. The Plaintiff, The Flipside, Hoffman Estates, Inc., alleges venue pursuant to 28 U.S.C. § 1391(b) in that all parties-Defendant to this action reside within the Northern District of Illinois and further that all the acts complained of did occur and presently continue to occur within the Northern District of Illinois.

BASIS FOR THIS ACTION

1. That the Defendants herein are residents and officers of the Village of Hoffman Estates, State of Illinois, who, acting individually, and in their official capacities, did on February 20, 1978, enact a certain criminal Ordinance No. 969-1978, Section 8-7-16 (a copy of which is attached hereto and made part of as Appendix A) and did further threaten Plaintiff with the application and enforcement of said Ordinance, which provides for criminal penalties should a violation occur.

2. That the Plaintiff has at all times complied with all laws governing the conduct of its business but will be unable to comply with Ordinance No. 969-1978, Section 8-7-16 for the following reasons:

a) That said Ordinance by its own terms concedes that the items covered are "legal retail items" (second paragraph of the preamble to the Ordinance.)

b) That because said Ordinance is overly broad and vague in its terms, men of common intelligence are incapable of determining precisely what items fall within the ambit of said Ordinance.

c) That although the Plaintiff engages only in the lawful sale of general items to be used only in a lawful manner, compliance with said Ordinance would require Plaintiff to file false affidavits indicating that certain of

these items are being sold with the intention that they be used for an unlawful purpose. (See Appendix B)

3. That Ordinance No. 969-1978, Section 8-7-16 unconstitutionally restrains the exercise of Plaintiff's First Amendment Rights by restricting and regulating the manner in which literature may be sold or displayed. (See License Guidelines attached hereto and made part of as Appendix C)

4. That subsection (D) of Section (1) of said Ordinance, requiring that Plaintiff keep records of the names and addresses of purchasers of items that may fall within the ambit of said Ordinance infringes upon Plaintiff's Fourth Amendment rights.

5. The Plaintiff alleges that Ordinance No. 969-1978, Section 8-7-16 fails to provide adequate notice to those who would be law abiding and forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

6. That Plaintiff believes said Ordinance fits squarely within the "void for vagueness" doctrine, and is therefore violative of the Fifth and Fourteenth Amendments to the Constitution of the United States.

7. Plaintiff alleges Ordinance 969-1978, Section 8-7-16 violates the due process clause of the Fifth and Fourteenth Amendment in that the means sought to be employed present an unreasonable, burdensome, and unworkable method to prevent the use of cannabis and controlled substances, and is not related to the legitimate purpose of a criminal statute.

8. That Ordinance No. 969-1978, Section 8-7-16 is inquisitorial in nature, authorizing improper and burdensome interference with the orderly conduct of a lawful business enterprise, and in that there exists no reasonable ground for suspecting a violation of law or a threat to public welfare, it abridges the Fifth and Fourteenth Amendments to the Constitution of the United States.

9. Plaintiff alleges that Ordinance No. 969-1978, was enacted specifically to punish and interfere with the conduct of Plaintiff's business in violation of Article I, Section 10, Clause 1 of the Constitution of the United States.

10. Plaintiff alleges that Ordinance No. 969-1978, Section 8-7-26 violates the Eighth Amendment prohibition of excessive fines and cruel and unusual punishment in that Plaintiff may be punished for conduct that citizens of common understanding and intelligence would not interpret to be unlawful, but may be held unlawful due to the vague language contained in said Ordinance.

11. Plaintiff alleges that enforcement of Ordinance No. 969-1978, Section 8-7-16 constitutes an unreasonable and impermissible interference with interstate commerce in violation of Article I, Section 8, Clause 3; the Commerce Clause of the Constitution of the United States; by improperly infringing on Plaintiff's right to conduct business in interstate commerce.

12. That Plaintiff alleges that this purported regulatory scheme unreasonably impairs the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States.

13. The Plaintiff, The Flipside, Hoffman Estates, Inc., alleges that it has suffered and will continue to suffer extreme hardship and irreparable injury in the form, inter alia, of loss of business, clientele, good will, and profits, all in an amount uncertain but in excess of TEN THOUSAND DOLLARS ($10,000.00), and in being subjected to criminal prosecution upon enforcement of Ordinance No. 969-1978, Section 8-7-16.

14. That Plaintiff has no plain, adequate or complete remedy at law, and the instant suit for Declaratory Judgment and Injunction Relief is the only adequate remedy.

15. That Plaintiff, The Flipside, Hoffman Estates, Inc., has already suffered substantial loss of profit and will suffer other

and more extensive damages upon enforcement of said Ordinance.

16. That Plaintiff, The Flipside, Hoffman Estates, Inc., will be unable to retain certain employees of said business should said Ordinance continue to remain in effect.

17. That should Plaintiff be forced to challenge each and every particular application of said Ordinance, as determined by law enforcement officers, the Plaintiff shall be forced to engage in multiple actions and lawsuits in order to protect its rights.

WHEREFORE, Plaintiff prays that:

1. This Honorable Court forthwith issue a Temporary Restraining Order pursuant to Rule 65 of the Federal Rules of Civil Procedure restraining the Defendants from enforcing Village of Hoffman Estates Ordinance No. 969-1978, Section 8-7-16.

2. That this Honorable Court issue a Preliminary and Permanent Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the Defendants from enforcing Village of Hoffman Estates Ordinance No. 969-1978, Section 8-7-26.

3. That this Honorable Court declare pursuant to 28 U.S.C. § 2201 and 2202 that Village of Hoffman Estates Ordinance No. 969-1978, Section 8-7-16 is violative of the First Amendment, the Fourth Amendment, the Fifth Amendment, the Fourteenth Amendment, the Eighth Amendment, Articles I, Section 8 and Section 10 of the Constitution of the United States and therefore void and unenforceable.

4. That this Honorable Court grant such other relief as may be due and proper.

Respectfully submitted,
/s/ Marvin Leavitt
Marvin Leavitt
PRITZKER & GLASS, LTD.
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-6666

I, CARL ROSENBAUM, being duly sworn on oath depose and say that I am agent for the Plaintiff, THE FLIPSIDE, Hoffman Estates, Inc.; that I have read and understand the foregoing Complaint for Declaratory Judgment and Injunctive Relief, and that the facts set forth therein are true and correct.

/s/ Carl Rosenbaum
Carl Rosenbaum

Subscribed and Sworn to before me
this 30th day of May, 1978.

/s/ Susan Decker
Notary Public

ORDINANCE NO. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional Section, 8-7-16, which additional section shall read as follows:

Sec. 8-7-16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or

drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs	$150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

Section 4: That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5: That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.

PASSED this 20th day of February, 1978

APPROVED this 20th day of February, 1978.

VOTE: AYES 3 NAYS 3 ABSENT 0

President Hayter voted aye.

APPROVED:

/s/ Virginia M. Hayter
Village President

ATTEST:

/s/ Regina F. Gold
Deputy Village Clerk

Appendix B

AFFIDAVIT

I hereby swear or affirm that in compliance with requirements of Section 8-7-16 of the Hoffman Estates Municipal Code and with knowledge of penalty up to $500.00 that I am authorized by , Hoffman Estates to sell items that may be covered by said Section 8-7-16 and that I have never been convicted in any court of law of a drug-related offense.

_____

Subscribed and sworn to me this
day of , 19 .

_____

Notary Public

Appendix C

LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

UNITED STATES DISTRICT COURT

Eastern Division

Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

ANSWER TO PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANTS

Now comes the defendants, VILLAGE OF HOFFMAN ESTATES, VIRGINIA M. HAYTER, JOHN O'CONNELL, WILLIAM W. COWIN, WILLIAM A. PALMER, BRUCE C. LIND, RALPH H. LYERLA, RICHARD N. WILLIAMS, THOMAS W. TAYLOR and LEE DODGION, by their attorney, Richard N. Williams, and answers Plaintiff's Complaint as follows:

THE PARTIES

1.-4. The defendants admit the allegations of paragraphs 1, 2, 3 and 4.

5. The defendants deny the allegations of paragraph 5 as to Lee Dodgion.

6. The defendants admit the allegations of paragraph 6.

JURISDICTION

1.-5. The defendants deny the allegations of paragraphs 1, 2, 3, 4 and 5.

VENUE

1. The defendants admit the allegations of paragraph 1.

BASIS FOR THIS ACTION

1.-17. The defendants deny the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17. Wherefore, defendants deny that plaintiffs are entitled to any relief of judgment and prays the suit be dismissed with costs.

/s/ RICHARD N. WILLIAMS
Richard N. Williams

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton
Cause No. 78 C 2114 Date December 12, 1978

Title of Cause

The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, et al.

ORDER

Reserve space below for notations by minute clerk

Plaintiff's motion for the court to assume jurisdiction is granted. Plaintiff's motion for the court's determination that the challenged ordinance is unconstitutional and for the granting of a preliminary injunction pursuant to Rule 65, Fed.R.Civ.P., is denied. The cause is set for status hearing on January 5, 1979, at 1:00 p.m.

Docketed December 13, 1978

/s/ Leighton, J.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed March 23, 1979)

IT IS HEREBY STIPULATED by and between the parties hereto that the full and complete testimony and evidence received in preliminary proceedings by this Honorable Court on September 1, 1978 shall be made a part of the trial record in this case as though the same questions were asked, the same answers given and the same evidence introduced.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed May 11, 1979)

IT IS HEREBY STIPULATED by and between the parties hereto that the attached Ordinance 932-1977 duly enacted October 3, 1977 shall be made a part of the trial records, such Ordinance having been referred to at Page 82 and Page 83 of witness Richard N. Williams direct testimony.

ORDINANCE NO. 932-1977

AN ORDINANCE ADDING A NEW ARTICLE TO THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES KNOWN AS THE "HOFFMAN ESTATES ADMINISTRATIVE PROCEDURE ORDINANCE"

NOW, THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, a Municipal Corporation of the County of Cook, State of Illinois, as follows:

Section 1: That a new Article be added to the Municipal Code of the Village of Hoffman Estates to be known as "The Hoffman Estates Administrative Procedure Ordinance" as follows:

CHAPTER 5

Article 8—Administrative Procedures Ordinance

Sec. 5-8-1—Applicability: This Ordinance applies to every Department as defined in Chapter 5.

Sec. 5-8-2—Rule: "Rule" means each Departmental statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any Department, but does not include (a) statements concerning only the internal management of a Department and not affecting private rights or procedures available to the public, (b) informal advisory decision or (c) intra-departmental memoranda.

Sec. 5-8-3—Adoption of rules; public information, availability or rules:

(A) Each Department shall:

(1) Adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public

may obtain information or make submissions or requests;

(2) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the Department.

(3) Make available for public inspection all rules adopted by the Department in the discharge of its functions.

(B) Each Department shall make available for public inspection all decisions and opinions.

(C) No Department rule is valid or effective against any person or party, nor may it be invoked by the Department for any purpose, until it has been made available for public inspection as required by this Ordinance. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

Sec. 5-8-4—Procedure for rule-making:

(A) Prior to the adoption, amendment or repeal of any rule, each Department shall:

(1) Give at least 10 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time, place and manner in which interested persons may present their views concerning the intended action. The notice shall be mailed to each person who has made timely request of the Department for advance notice of its rule-making proceedings.

(2) Afford all interested persons reasonable opportunity to submit data, views or arguments, which may, in the discretion of the Department be submitted either orally or in writing or both. The Department shall consider fully all submissions respecting the proposed rule.

(B) If any Department finds that an emergency, reasonably constituting a threat to the public interest, safety or welfare, requires adoption of a rule upon fewer than 10 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period of not longer than 120 days but the agency's authority to adopt an identical rule under subsections A (1) and A (2) of this Section is not precluded.

(C) No action by any Department to adopt, amend or repeal a rule after this Ordinance has become applicable to the agency shall be valid unless taken in substantial compliance with this Section.

(D) Any rules and regulations existing on the date prior to the effective date of this Ordinance may be adopted without compliance to these procedures.

Sec. 5-8-5—Filing and taking effect of rules:

(A) Each Department shall file in the office of the Village Clerk a certified copy of each rule adopted by it, including all rules existing on the date this Ordinance becomes applicable to the Department other than rules already so filed. The Village Clerk and the Department shall each keep a permanent register of the rules open to public inspection.

(B) Each rule hereafter adopted is effective 10 days after filing, except that:

(1) If required by Ordinance or specified in the rule, a later date is the effective date.

(2) Subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing with the Village Clerk or at a stated date less than 10 days thereafter, if the Department finds that this effective date is necessary because of emergency. The Department's finding and a brief statement of the reasons therefor shall be filed with the rule. The Department shall take reasonable and appropriate measures to make emergency rules known to the persons who may be affected by them.

Sec. 5-8-6—Petition for adoption of rules: Any interested person may petition a Department requesting the promulgation, amendment or repeal of a rule. Each Department shall prescribe by rule the form for petitions and the procedure for their submission, consideration and disposition. If, within 30 days after submission of a petition, the Department has not initiated rule-making proceedings in accordance with Section 5-8-4 of this Article, the petition shall be deemed to have been denied.

Sec. 5-8-7—Appeals: Any person aggrieved by the adoption, amendment or repeal of any rule under the procedures herein may request that the Village Manager place the issue before the appropriate committee of the Village Board. There shall be an opportunity for the aggrieved person or persons and the Department to present the merits of the issue before the Committee. The Committee shall make a recommendation to the Village Board. The Village Board shall resolve the issue by Resolution or Ordinance, as appropriate.

Sec. 5-8-8—Severability: If any provision of this Ordinance or the application thereof to any person or circumstance is

held invalid, the invalidity shall not affect other provisions or applications of the Ordinance which can be given effect without the invalid provision or application, and for this purpose the provisions of this Ordinance are severable.

Section 2: That the Village Clerk is hereby authorized to publish this Ordinance in pamphlet form.

Section 3: That this Ordinance shall be in full force and effect from and after its passage, approval and publication.

PASSED this 3rd day of October, 1977.

APPROVED this 3rd day of October, 1977.

VOTE: AYES 5 NAYS 0 ABSENT 1

APPROVED:

/s/ Virginia M. Hayter
Village President

ATTEST:

/s/ Helen Wozniak
Village Clerk

Published in pamphlet form this 4th day of October, 1977.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed May 11, 1979)

IT IS HEREBY STIPULATED by and between the parties that were a pipe expert called to testify in the above entitled matter he would testify as follows:

1. That pipe smoking has been one of man's habits for well over 1,000 years.

2. That pipes have been and can be fashioned from almost any type of material to include but not limited to: iron; gold; silver; plastic; stone; platinum; jade; porcelain; mineral; glass; clay; shells; bone; and, wood. (See Exhibits Attached Hereto and Made a Part Hereof.)

3. That pipe bowls and stems are of various shapes and sizes and that shape and size is a matter left to the discretion of the user, there being marketed pipes in all sizes and shapes, made of all of the above materials, and others, as well. (See Exhibits Attached Hereto and Made a Part Hereof.)

4. That there is a nationwide market for pipes as collectibles (as evidenced by exhibits attached hereto and made a part hereof) in all of the above materials, new or used, functional or not, as even broken used pipes may have some collectible value.

Stipulated and Agreed:

Attorney for the Village of Hoffman Estates et al.

Dated:

Attorney for Plaintiff

Michael L. Pritzker
Attorney for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed May 11, 1979)

IT IS HEREBY STIPULATED by and between the parties hereto that if DONALD R. LEVIN were to testify in this matter he would state as follows:

1. That he is the President of Adam's Apple Distributors Inc.

2. That the items enumerated on the evidence list attached hereto and made a part hereof were sold from Adams Apple Distributors Inc. and were identical or similar to items furnished by Adams Apple Distributors Inc. to Plaintiff.

3. That many of said items were imported from other states and other countries.

4. That when advised of the enactment of the subject legislation Adam's Apple Distributors Inc. discontinued selling almost all items, including those enumerated on Exhibit A attached hereto and made a part hereof, arguably within the ambit of said legislation because they were unable to definitely ascertain what items were specifically regulated and or prohibited by said Ordinance.

Stipulated and Agreed:

Attorney for the Village of Hoffman Estates et al.

Dated:

Attorney for Plaintiff

MICHAEL L. PRITZKER
Attorney for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed May 11, 1979)

IT IS HEREBY STIPULATED by and between the parties hereto that if LARRY ROSENBAUM were to testify in this matter he would state as follows:

1. That he is the owner and operator of Flipside of Hoffman Estates, Inc., Plaintiff herein.

2. That the items ennumerated on Exhibit A attached hereto and made a part hereof were items marketed and sold by Plaintiff prior to May 1, 1978, the effective date of the subject Ordinance.

3. That said items and others were removed because they arguably fall within the ambit of the subject Ordinance.

4. That Plaintiff has lost and continues to lose thousands of dollars in sales and profits because they are uncertain what items are covered under the Ordinance.

5. That a prior adversary hearing as to the application of the Ordinanace to each and every item which may be sold would cost thousands of dollars and create repeated hearings and litigation each time a new product was introduced.

6. That Plaintiff does not sell millinery wear, tobacco or pharmaceuticals.

Stipulated and Agreed:

Attorney for the Village of Hoffman Estates et al.

Dated:

Attorney for Plaintiff

MICHAEL L. PRITZKER
Attorney for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

EXHIBIT A

Plaintiff's Exhibits	Description
Plaintiff's Exhibit No. 1	Clamp
Plaintiff's Exhibit No. 2	"Guitar" Chain Ornament
Plaintiff's Exhibit No. 3	"Key" Chain Ornament
Plaintiff's Exhibit No. 4	"Alligator" Clip
Plaintiff's Exhibit No. 5	Key Chain
Plaintiff's Exhibit No. 6	Key Chain
Plaintiff's Exhibit No. 7	Key Chain
Plaintiff's Exhibit No. 8	Key Chain
Plaintiff's Exhibit No. 9	Necklace
Plaintiff's Exhibit No. 10	Earrings
Plaintiff's Exhibit No. 11	Earrings
Plaintiff's Exhibit No. 12	Earrings
Plaintiff's Exhibit No. 13	Cigarette Holder
Plaintiff's Exhibit No. 14	Cigarette Holder
Plaintiff's Exhibit No. 15	Necklace
Plaintiff's Exhibit No. 16	Glove Stretchers
Plaintiff's Exhibit No. 17	Scale
Plaintiff's Exhibit No. 18	Scale
Plaintiff's Exhibit No. 19	Scale
Plaintiff's Exhibit No. 20	Scale
Plaintiff's Exhibit No. 21	Strainer
Plaintiff's Exhibit No. 22	Strainer
Plaintiff's Exhibit No. 23	Strainer
Plaintiff's Exhibit No. 24	Pulverizer
Plaintiff's Exhibit No. 25	Squeeze Bottle
Plaintiff's Exhibit No. 28	Squeeze Bottle
Plaintiff's Exhibit No. 29	Tobacco Tin/Cigarette Holder
Plaintiff's Exhibit No. 30	Cigarette Holder
Plaintiff's Exhibit No. 31	Cigarette Holder
Plaintiff's Exhibit No. 32	Cigarette Holder
Plaintiff's Exhibit No. 33	Cigarette Holder
Plaintiff's Exhibit No. 34	Pipe
Plaintiff's Exhibit No. 35	Pipe
Plaintiff's Exhibit No. 36	Pipe
Plaintiff's Exhibit No. 37	Pipe
Plaintiff's Exhibit No. 38	Pipe

Plaintiff's Exhibits	Description
Plaintiff's Exhibit No. 39	Pipe
Plaintiff's Exhibit No. 40	Pipe
Plaintiff's Exhibit No. 41	Pipe
Plaintiff's Exhibit No. 42	Pipe
Plaintiff's Exhibit No. 43	Pipe
Plaintiff's Exhibit No. 44	Pipe
Plaintiff's Exhibit No. 45	Pipe
Plaintiff's Exhibit No. 46	Pipe
Plaintiff's Exhibit No. 47	Pipe
Plaintiff's Exhibit No. 48	Pipe
Plaintiff's Exhibit No. 49	Pipe
Plaintiff's Exhibit No. 50	Pipe
Plaintiff's Exhibit No. 51	Water Pipe
Plaintiff's Exhibit No. 52	Water Pipe
Plaintiff's Exhibit No. 53	Water Pipe
Plaintiff's Exhibit No. 54	Water Pipe
Plaintiff's Exhibit No. 55	Water Pipe
Plaintiff's Exhibit No. 56	Water Pipe
Plaintiff's Exhibit No. 57	Necklace
Plaintiff's Exhibit No. 58	Necklace
Plaintiff's Exhibit No. 59	Pins
Plaintiff's Exhibit No. 60	Herb Sifter
Plaintiff's Exhibit No. 66	Mirror
Plaintiff's Exhibit No. 67	Vials
Plaintiff's Exhibit No. 68	Cigarette Rolling Papers
Plaintiff's Exhibit No. 69	Cigarette Rolling Papers
Plaintiff's Exhibit No. 70	Cigarette Rolling Papers
Plaintiff's Exhibit No. 71	Cigarette Rolling Papers
Plaintiff's Exhibit No. 72	Cigarette Rolling Papers
Plaintiff's Exhibit No. 73	Cigarette Rolling Papers
Plaintiff's Exhibit No. 74	Cigarette Rolling Papers
Plaintiff's Exhibit No. 75	Cigarette Rolling Papers
Plaintiff's Exhibit No. 76	Cigarette Rolling Papers
Plaintiff's Exhibit No. 77	Cigarette Rolling Papers
Plaintiff's Exhibit No. 78	Tobacco Snuff
Plaintiff's Exhibit No. 79	Mirror

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed May 11, 1979)

IT IS HEREBY STIPULATED by and between the parties to the above entitled matter that if JOHN O'CONNELL, Chief of Police, Village of Hoffman Estates, Illinois, were to testify in this matter, he would state as follows:

That any pipe may be used to smoke marijuana. That an establishment selling pipes need not have a license as required by the challenged Ordinance, unless that pipe or other smoking item contained or displayed a phrase or picture which suggested a possible association with a controlled substance (e.g. a marijuana leaf). That such phrase or picture appearing on the otherwise lawful item subjects it to coverage under the Ordinance. That selling pipes or other smoking material in proximity to certain literature concerning drugs could also be the basis for the license requirement. That if an existing pipe store started to sell certain literature such as High Times and Stone Age they would then need an additional license and the sale of all pipes would then fall under the regulations and prohibitions of the statute. Mirrors notwithstanding any phrase or depiction are not covered by the Ordinance. Weighing Scales might be covered depending on the presence of a phrase or picture found on the Scale or its packaging.

The primary purpose of that part of the challenged Ordinance, which requires that merchants maintain a police register or record of purchasers, of those items sought to be regulated, is to discourage persons in the Hoffman Estates community from purchasing those items. That the requirement that all purchasers of items sought to be regulated sign a police

record, open to police inspection, serves to discourage customers, much the same way that requiring patrons of a motel to sign a guest register discourages certain persons from using the services of that type of establishment.

The Chief would not be able to state which specific items were covered by the Ordinance and would testify that determination as to which items actually fall under the purview of the Ordinance, at any given time would be left, in large part, to the judgment of detectives on his staff.

This stipulation is made to summarize Chief John O'Connell's statements with respect to the challenged Ordinance, a conference having taken place on May 1, 1979 with Chief John O'Connell, Richard Williams, Attorney for Defendants and Michael L. Pritzker, Attorney for Plaintiff, all present.

Stipulated and Agreed:

_____

Attorney for the Village of Hoffman Estates et al.

Dated:

/s/ Michael L. Pritzker
Attorney for Plaintiff

MICHAEL L. PRITZKER
Attorney for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto that if HELEN WOZNISK, Clerk of the Village of Hoffman Estates, Illinois, were to testify in this matter she would state as follows:

That the subject Ordinance is a regulatory ordinance. That the ONE HUNDRED AND FIFTY AND NO/100 ($150.00) DOLLAR licensing fee was established by the Public Health and Safety Committee of Hoffman Estates, Illinois, to compensate the Village for the costs incurred in administering the Ordinance. That the general business license issued by the Village of Hoffman Estates carries with it a THIRTY AND NO/100 ($30.00) DOLLAR fee; that the additional cost of the license created by the subject Ordinance is assessed to compensate for those additional expenses incurred by checking the criminal records of the establishments' employees and for the monitoring of the police register the merchant is required to maintain.

It would further be the testimony of the Clerk of the Village that the ONE HUNDRED FIFTY AND NO/100 ($150.00) DOLLAR fee was based on the estimated cost to the Village of administering the Ordinance.

Stipulated and Agreed:

Dated:

Attorney for the Village of Hoffman Estates et al.

/s/ Michael L. Pritzker
Attorney for Plaintiff

MICHAEL L. PRITZKER
Attorney for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed July 6, 1979)

IT IS HEREBY STIPULATED by and between the parties hereto that if called upon to testify DANA MALLEK would testify that:

He is a deputy Clerk of the Circuit Court assigned to the Circuit Court of Cook County, Illinois assigned to the Second Municipal District, Criminal Division.

He has been employed in that capacity for several years.

That in that capacity he reviewed the criminal court calendar for the Village of Hoffman Estates for the period July, August, September, October 1977 and July, August, September, October 1978 for violations of Illinois Cannabis and Controlled Substances laws. His search of said docket for those periods revealed that for the 1977 period there were 28 Defendants and 29 cases and for the same period in 1979 there were 62 Defendants and 62 violations.

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

* * (Caption—No. 78 C 2114) * *

* Note—all questioning for Plaintiff was conducted by Mr. Pritzker and reference to Mr. Leavitt as conducting examinations is in error.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. GEORGE N. LEIGHTON, one of the Judge of said Court in his courtroom in the United States Courthouse at Chicago, Illinois on September 1, 1978 at the hour of 10:00 a.m.

PRESENT:

MR. MARVIN LEAVITT
MR. MICHAEL L. PRITZKER
for the plaintiffs;

MR. RICHARD N. WILLIAMS
for the defendant.

[2] THE CLERK: 78 C 2114, Flipside Records vs. Village of Hoffman Estates, et al., hearing on temporary restraining order.

THE COURT: Will you tell me how much time this is going to take?

MR. WILLIAMS: I am sure we will be completed by noon, your Honor.

MR. LEAVITT: That is correct.

MR. WILLIAMS: Perhaps a half hour.

THE COURT: All right, let me just take a moment then and look at this again.

When it was here last, could you remind me what we did in this matter?

MR. WILLIAMS: I appeared, your Honor, and Mr. Leavitt was out of the state on another trial and it was continued to today's date. I understand we are here on their request for a temporary and permanent injunction.

MR. LEAVITT: That is not exactly correct. We appeared before you—

THE COURT: Who represents the plaintiff?

MR. LEAVITT: We represent the plaintiff.

For the record, your Honor, Marvin Leavitt of the law firm of Leavitt and Schneider.

MR. PRITZKER: Michael Pritzker, 134 North LaSalle.

* * * *

[6] LAWRENCE ROSENBAUM,
a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

THE CLERK: State your full name for the record and spell your last name.

THE WITNESS: Lawrence Rosenbaum, R-o-s-e-n-b-a-u-m.

BY MR. PRITZKER:

Q Are you an officer or director of the plaintiff which is Flipside Hoffman Estates, Inc.?

A Yes, I am. I am the secretary-treasurer.

Q Where is that corporation incorporated?

A In the State of Illinois.

Q What duties do you undertake as an officer of that corporation?

A I, along with my brother operate the corporation.

Q What business does the corporation have?

A Retail sale of records, tapes, related items, and also ticket sales through Ticketron.

Q Through what outlet does it maintain this business [7] or occupation? Where is this store located?

A The location is in the Barrington Square Mall which is at Hoffman Estates.

Q Does Flipside Hoffman Estates have any other stores or locations?

A No, but Flipside is a group.

Q No, I just asked you the question as to that?

A No.

Q So that store located in Hoffman Estates is the sole business of Hoffman Estates Flipside?

A Correct.

Q How long has that store been in business?

A Approximately two years and two months. It was opened the early part of June of '76.

Q Up to and through March of 1978, what merchandise was being offered for sale at that location?

A Phonograph records, tapes and related accessories, shirts, clothing for a short period of time, and tobacco, novelty devices and jewelry.

Q Did you offer any literature for sale?

A Yes, we sell Rolling Stone magazine, National Lampoon, High Times magazine and that's about it.

* * * *

[13] MR. PRITZKER: You see, one of the problems we are attacking in the ordinance, your Honor, is that the permit from its nature is so unfair we are not sure that what items we may or may not sell.

THE COURT: Did the plaintiff ever go and ask them?

MR. PRITZKER: Pardon me?

THE COURT: Did the plaintiff ever go and ask them and find out from the regulatory authorities what is the—I don't quite understand. Candidly, none of these ordinances are models of clarity. I have never seen one that is exactly a model of clarity.

MR. PRITZKER: We would like some—

THE COURT: But I had no trouble understanding this ordinance when I looked at it in connection with the motion for a TRO.

MR. PRITZKER: It is specific items that are restrictive. How does one know whether or not one is intended—designed or intended for use with an illegal drug, and there is also attached Exhibit C, the license guidelines. For example, if I may mention one other point, since we are talking about pipes, it says "If displayed away from the proximity of non-white papers or tobacco oriented papers and not displayed [14] within the proximity of roach clips or literature encouraging the illegal use of cannabis or illegal drugs not covered or otherwise covered."

So, for example, a pipe not near literature may become a prohibited item under the statute but if away from literature is an uncovered item. Well, the pipe hasn't changed its character by virtue of the fact that it is next to Harvard National Lampoon. Is that such literature encouraging the use of marijuana or—

THE COURT: All right. Suppose you pursue this line with this witness because I would like to know what items is it that the plaintiff is no longer selling because of this ordinance.

BY MR. PRITZKER:

Q Did you ever have any meetings with officials of the village with regard to what items specifically may or may not be sold in your store?

A I talked to Mr. Williams a couple of times regarding this entire thing.

Q Now you indicated some of the things that you are no longer selling are pipes, is that correct?

A That is correct.

Q Where did you display or sell pipes in the store prior to March of 1978?

[15] A They were displayed in glass showcases toward the front of the store near the cash register counter.

Q What instructions do you or your personnel give to purchasers with regard to the use of any of the merchandise sold in your store?

A Our employees are instructed not to—basically they are just to sell items. They don't instruct people how to use records and tapes, they don't instruct people how to use rolling papers and pipes and various other items.

Q What type of rolling papers did you offer for sale prior to March of 1978?

A A pretty general line of about 25 or 30 different brands of rolling papers. Basically the only difference between rolling papers are size although some of them are flavored and scented.

Q Subsequent to the passage of the ordinance, what, if any, papers do you now sell?

A We presently now sell only one white rolling paper.

Q Would you describe some of the jewelry items—I'm sorry, strike that.

Did you have any conversation with Mr. Williams with regard to the sale of papers at your store in Hoffman Estates?

A Yes. He was—he told me that white papers are [16] acceptable under the guidelines of the ordinance and he, in fact, sent me that sheet which shows the guidelines.

Q Were any of the colored papers, as far as you know, designed for use with any illegal substance?

A Not that I am aware of, no.

Q The pipes that you sold, did they all come or did any come with imprinted instructions in addition to any instructions that may or may not have been given by you in the store?

A No. All of the pipes come unpacked and contain no instructions at all that I am aware of.

Q Where did you maintain literature in the store?

A Magazines are generally kept near the cash register because they are a point of purchase type of item.

Q The pipes and other rolling papers, where were they kept?

A In the same general area.

Q Why is that?

A Because it is not a self-service type of item. Most of these items are too small and therefore very apt to be shoplifted if they are left unattended.

Q Did you have any conversation with Mr. Williams with regard to the sale of any of the items besides the rolling papers?

[17] A Generally, yes.

Q Do you recall the content of that conversation of what you were instructed to do regarding the sale of some of these items?

A He didn't give me any specific instructions. He did provide those guidelines, though.

Q Did he describe to you—well, let me start back.

Do you recall the four types of items that were set out on the license guidelines, the four categories?

A If I remember correctly, it was paper, pipes, literature and there was a general jewelry category but I am not exactly sure. It has been a while since I looked at that.

Q Do you recall that the license guidelines set out four categories, papers, roach clips, pipes and paraphernalia?

A Okay.

Q Now did you have any conversation which cleared up the definition of paraphernalia in terms of what, if any, of your items may have been intended to be covered under that guideline?

A No, not specifically, not with anybody specifically with the Village.

Q So the only guidelines that you had to go on with regard to the definition of paraphernalia was "If [18] displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs is covered," is that correct?

A Right.

Q So you have no other guidelines or assistance in terms of defining the word "paraphernalia" is that correct?

A That is correct.

Q With regard to pipes, did you have any conversation in addition to the guidelines set out by the village that would assist

in terms of the definition of pipes or controlling areas where pipes may be sold?

A No, not at all.

Q Other than the guideline which states that "Roach clips designed for use with illegal cannabis or drugs and therefore covered" fell within the guidelines, was there any definition of what a roach clip is?

A No.

Q You indicated that there were different guidelines with regard to papers, is that correct?

A Right. As far as colored papers versus white papers.

Q Was there any explanation or reason given why papers with colorful design or names oriented for use [19] with illegal cannabis or drugs were covered under that? That is, was there any explanation of colorful design?

A No, none that I recall.

Q Was there any reason why colored or flavored papers were prohibited where white papers were allowed?

A No, not that I recall.

Q What effect would continued compliance with the ordinance have on the store in Hoffman Estates?

A Because of the high profit nature of these items and the high cost of operation of such a large operation, it is very possible that the store will cease to exist without that additional profit.

Q What impact has been had on the store by not offering these items for sale?

A Aside from the immediate loss of income which I went into before, we have been getting a lot of feedback from the customers as to the fact that they are very dissatisfied with the present fate of that particular Flipside location and are now

doing their shopping in general at Woodfield where they can go and they can go to Marshall Fields and The Alley and Disk Records and Musicland and do all of their shopping in one location where they used to be able to do that at The Flipside.

Q Excuse me a moment.

[20] In order to obtain a license in order to comply with those items which you would be allowed to sell under the Village you had to sign an affidavit, is that correct?

A Yes.

Q You also had to acknowledge that you were selling certain covered items, is that correct?

A Right.

Q Did you know what items were covered from reading the statute?

A No, not really.

Q You were also required to maintain a ledger, isn't that correct?

A Yes.

Q What requirements did that impose upon your personnel when a purchase of an item was made—an item, let's assume, that you knew was covered, for example, colored paper.

A The ordinance required that we get the name, address, signature and exactly what was purchased from the customer.

Q Did the customer himself have to sign a log sheet or did you have to get information from him and sign it?

A I believe that there was a space for his signature.

[21] Q That was because you did not acknowledge that you were selling drug related paraphernalia, is that right?

A That is correct.

Q As a result of that you have been instructed not to sell those items as described in the ordinance?

A Right. Well, yes, and we have chose not to sell anything that may fall on either side because we really can't get a reading on exactly what is and what isn't covered by the ordinance except white papers.

MR. PRITZKER: I have no other questions.

THE COURT: Let me be sure I understand this: The items which the plaintiff no longer sells because of the ordinance are pipes, rolling papers and what else?

MR. PRITZKER: Jewelry items.

THE COURT: Jewelry.

MR. PRITZKER: Yes, sir.

THE COURT: Now we can agree, can't we, that the word "jewelry" does not appear in this ordinance.

MR. PRITZKER: Well, but it is intended and I think that it may be.

THE COURT: Well, how is it intended?

MR. PRITZKER: By paraphernalia.

THE COURT: I see.

* * * *

[23] I would like to know what literature.

MR. PRITZKER: So would we, but I assume, for example—

THE COURT: But this gentleman here who is testifying for the plaintiff, he must know.

BY MR. PRITZKER:

Q What literature? Were you ever given instructions as to what literature was included under the statute?

A No, we were not given specific instructions but rather than risk any problems or the loss of our business license or any arrests of our personnel, we thought it best to totally eliminate anything that would fall into the gray area until the entire matter is resolved.

Q What literature do you think might contemplate or fall within the gray area?

A Well, High Times Magazine, National Lampoon Magazine, even the Rolling Stone Magazine.

Q Any other books?

A Other books.

THE COURT: Magazines and books, we will get to that later.

Anything else?

BY MR. PRITZKER:

Q The ordinance also prohibited if you continue to sell certain literature to maintain the sale of your [24] pipes within the proximity of certain literature, is that correct?

A Yes.

Q Was "proximity" defined for you?

A No, it was not.

Q Is there any practical reason why you effectively do not offer pipes for sale in a different part of the store than that where your literature was maintained other than those reasons which you have stated?

A No, but not knowing what "proximity" is, even though it is a large store, it is still only 4,000 square feet and who is to say what proximity is.

Q That is 4,000 square feet but they are not all available to the customer, are they?

A Most of it is.

* * * *

[33] EARL W. MAURER,
a witness called by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE COURT: State your full name and spell your last for the witness.

THE WITNESS: Earl W. Maurer, M-a-u-r-e-r.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Earl, what is your occupation?

A Police Officer for the Village of Hoffman Estates.

Q How long have you been a police officer?

A About 11 and a half years.

Q What has been your assignment for the past year?

A I am assigned to the Detective Division.

Q In February of this year were you assigned to take certain photographs at the Flipside Record Shop in Hoffman Estates?

A Yes, I was.

MR. WILLIAMS: I believe, your Honor, by stipulation [34] of the parties, if Officer Maurer were to testify, he would testify that he took these pictures on February 7th at the Flipside, 1978, and they are true and accurate portrayals of certain display areas of that particular store.

MR. PRITZKER: So stipulated.

THE COURT: All right. So stipulated.

BY MR. WILLIAMS:

Q Officer, as to what is have marked as Exhibit F, a picture that is stipulated you took on that day, there is something marked "power hitters." In your experience of 11 years as a police officer, have you ever come across such an item or do you know what such an item is?

MR. PRITZKER: Objection. This testimony relates to February 7th which was prior to the effective date of the ordinance. At that point the merchandise offered for sale is not relevant.

MR. WILLIAMS: I think it is.

I think from your own testimony you have withdrawn all types of merchandise so we certainly wouldn't have any evidence that this is what the ordinance is directed towards. I think it is necessary to put in the record the types of volumes that were sold at that store that you were objecting to.

[35] THE COURT: What about that? As I understand it, those pictures show the items that were being sold on—February what?

MR. PRITZKER: February 7th, your Honor.

THE COURT: February 7th.

MR. PRITZKER: Yes.

THE COURT: And the ordinance was adopted February 20th, is that right?

MR. WILLIAMS: Effective May 1.

THE COURT: Effective May 1. But adopted, as I remember it, and it was voted on on February 20th.

MR. WILLIAMS: Correct.

THE COURT: Effective May 1.

Now the pictures you have there show a display on February 7th?

MR. WILLIAMS: That is correct.

THE COURT: What is the point of those pictures now with relation to the—

MR. WILLIAMS: To indicate to the Court what type of items were being sold and the presumptive uses of those items at that store.

THE COURT: Are those the same items that were sold—oh, I see, those are the items that the plaintiff says it discontinued because of the ordinance, is that right?

[36] MR. PRITZKER: That is right.

THE COURT: All right. Then the objection will be overruled.

Proceed.

BY MR. WILLIAMS:

Q Officer, do you know what a power hitter is?

A A power hitter is a plastic bottle with a hole in the top large enough for a cigarette to be put into so that it collects the smoke that burns from the burning end of the cigarette and then goes back through the cigarette to the smokers mouth to avoid losing any of the smoke into the air, gaining greater value of the use of the tobacco or whatever is being burned.

Q Officer, in your experience of 11 years, have you seen items such as described by the previous witness as roach clips worn around the necks of any youths that you dealt with or any other parties?

A I have seen them worn on people.

Q Have you also ever seen them in active use?

A Yes, I have.

Q From those experiences do you recall whether they were all or some tobacco use or all or some non-marijuana use?

A Whenever I came in contact with someone using [37] what is called a roach clip to smoke the item that is being smoked it was always found to be cannabis.

Q Officer, have you come in contact with what is known as a bomb pipe?

A Yes.

Q Have you seen persons in the community using such an item?

A Several times I have seen it.

Q Do you recall what was used with that type of pipe?

A Generally analysis shows that it was cannabis that was being smoked.

Q Was there any—you say generally. Was there anything else that was ever found to your knowledge?

A I believe there was one time that regular tobacco was being smoked in a bomb pipe.

Q Officer, have you yourself ever rolled your own cigarettes?

A No.

Q Have you seen marijuana cigarettes that have been rolled?

A Yes, I have.

Q What type of paper, if any, was used in your recollection?

A Cigarette rolling papers of various colors and [38] some are scented.

Q Have you seen it with just simple white papers as well?

A Yes.

Q Have you also seen farmers in the community using simple white paper?

A I have never noticed them.

MR. WILLIAMS: I have no further questions.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. PRITZKER:

Q When you were in the store on February 7, 1978 and took these photographs, did you read any of the literature that you had taken the photographs of?

A You mean books and magazines?

Q Yes.

A No.

Q Did you have a conversation with any of the personnel that was there with regard to any of the items?

A Briefly, yes.

Q Officer, are you familiar with the expression "You can't tell a book by its cover"?

A I have heard it.

MR. PRITZKER: I have no further questions.

* * * *

[60] RICHARD M. WILLIAMS,
a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: Please be seated. State your full name for the record.

THE WITNESS: Richard M. Williams.

DIRECT EXAMINATION

BY MR. LEAVITT:

Q Mr. Williams, you are employed as the Village Attorney of Hoffman Estates?

A That is correct.

Q How long have you been so employed?

A I have been employed by the Village of Hoffman Estates since September 1973 in the capacity of prosecutor and since February of 1977 in the capacity of Village Attorney and prosecutor.

Q In your capacity as village attorney, did you have occasion to be called upon to consult with regard to a village ordinance, the ordinance in question, village ordinance 1978-917?

A Yes.

Q Did you draft the ordinance which is in dispute here?

A Yes.

Q Did you also draft the guidelines which were [61] issued with that?

A Yes.

Q How did it come to you to draft the ordinance? Which steps were taken in the administrative procedure so that you came to draft the ordinance?

A The village Board is divided into six committees, and the Committee on Health, Safety and Welfare directed the attorney to draw an ordinance to ban or regulate or zone as to matters of drug paraphernalia sales in the community.

Q Were you a party at the hearings which undertook—which were undertaken by that committee?

A I may have been. I come and go on those Monday nights.

Q Do you know what evidence while you were there or are you aware of what was undertaken by the village in order to draw the conclusion and issue to you the instruction to draw the ordinance?

A I recall Trustee Collins, whose offices are adjacent to the Flipside Records Store, indicated his concern with the youth in the area buying these things and being observed smoking with these items.

Based upon his representations and further discussion, the motion came to fruition.

Q Was there any expert testimony called by the [62] committee in order to establish the use of the items sought to be regulated?

A I don't recall whether the police department was consulted or not.

Q Do you know if any independent persons or experts were called upon or if any reports or statistics were submitted in order to give the committee a factual basis upon which to reach a conclusion?

A To my knowledge, no.

Q What direction were you given with regard to writing the ordinance in question?

A The direction as I testified to earlier with broad guidelines to either ban or regulate or set up zoning districts.

Q So it was you that selected the form and mode that the ordinance finally took?

A That is correct.

Q Subsequently the ordinance was submitted back to the committee for approval, is that correct? Do they pass on it in committee before the City Council does?

A The ordinance went directly to the village Board for a first reading after the direction by the committee.

Q Were you present at the Village Board meeting when it was voted upon?

A Yes.

[63] Q What, if any, expert testimony was presented to the Village Board in consideration of the question?

A None.

Q In there you also as a part of the enforcement section of the ordinance created a police ledger?

A Pardon?

Q A police ledger was made part of the ordinance; that is, to have persons sign a ledger when certain items were purchased?

A A journal or ledger required to be kept by the shopkeeper, yes.

Q And a special license was also authorized to be issued for the items intended to be covered under the Act, isn't that correct?

A That is correct.

Q In the sale of any of those items, somebody had to sign this ledger, is that correct?

A That is correct.

Q Did the police have access to that ledger under the design of the ordinance?

A Yes, they would.

Q Did you have any conversation with the Chief of Police with regard to the enforcement of that section?

A Yes, sir, I did.

Q When did those conversations take place?

A They would have taken place between the time of the direction to draw the ordinance and the final passage.

[64] Q What was the purpose of the police ledger?

A I discussed with the chief the Controlled Substance Act that requires this for low grade controlled substances and advised him on Fourth Amendment or privacy questions being publicly known. This would be a free choice similar to airline magnometers; that there was no case law in the State of Illinois that used the Uniform Controlled Substance Act and our position on those types of ledgers claiming any chilling effect or anything of that matter; what manner or use you could make of that information in observing or detecting such dealings and use in the community.

Q And did you advise him that in fact he had a right under the ordinance to inspect, to see who purchased any of the items covered under it?

A Yes.

Q Did he have a right to make copies or write the names of the individuals who purchased any of the items?

A I did not say it in so many words.

Q Does the ordinance, in your opinion, allow it?

A Yes.

Q Did you have any conversations with the police chief subsequent to the passing of the Act with regard to its enforcement?

[65] A I have had conversations regarding the Act but I can't recall any as to the enforcement effort. Our studies and survey by our health department showed only one merchandiser that would continue to have that type of merchandise and enforcement never became an issue.

Q And what merchandiser was that?

A The Flipside Store.

Q When you say items like that, the ordinance refers to, for example, paper and it has a caption and it talks about white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. I assume by that it means it may be displayed without somebody buying it and signing a police register, is that correct, or does that mean that they may be displayed at all?

A They may be displayed if they are displayed in such a manner that they are not designed to market it for use with illegal drugs.

Q Now in any of the considerations given, were there any design differentials brought to your attention between Cannabis and cigarette designed papers?

A Yes. I made my own investigation.

Q And what design differential between papers did you find?

[66] A I found in most stores it is white paper or some colored paper. In the Flipside store it had connotations of use with Cannabis and was placed with roach clips and with other items that could be presumed to be used only with illegal Cannabis or drugs.

Q Presumed by whom?

A Presumed by the information I received from the police department and on the use of roach clips.

Q When you say a roach clip, what are you referring to?

A Having never used one and not looking at one, what I am referring to and would understand would be an item that holds a hot burning cigarette so that one can get down to the last puff because of the intense heat of marijuana as compared to tobacco.

Q Let me show you what has been marked as Plaintiff's Exhibit No. 1 in evidence. I ask you if you can describe that item.

A It looks like a pair of scissors that doesn't open up.

Q It is, in fact, a hemostat, a surgical clamp. You squeeze it together and it opens up. Did you, as a matter of fact, in your examinations, ever go to Flipside Records?

A I am a regular customer, both as village attorney [67] and as a customer I have observed the items.

Q Did you have occasion to observe these items on sale prior to enactment of the ordinance in this section where cigarette papers were sold?

A I can't recall seeing that item. I saw items.

Q Now you talked about the heat of the cigarette. In that regard, are there not, in fact, many systems which produce the heat and filter of cigarettes?

A I am not a cigarette smoker. I would speculate that if we could put a man on the moon, we can reduce the heat of a cigarette.

Q Have you ever in your experience, outside your role as village attorney, viewed what is numbered Plaintiff's Exhibit No. 64 which purports to be Aquafilter, a cigarette filter which has a filter filled with water? Have you seen those or seen advertisements?

A I think I have heard the word. I haven't seen them before.

Q And would that have the same effect of reducing the heat and hold a cigarette down to the very last bit as a roach clip?

A I don't know.

Q What would the purpose be of Flipside records selling hemostats or medical clamps?

A Well, they are not a licensed pharmacy so I would [68] imagine it depends on how they market it. If they market it with Winston's and Camel's and L&M's and other tobacco users, it would be for tobacco use.

If they market it with other items that the police tell me they have found in evidence with traces of cannabis and other items, then they are marketing it for use with marijuana,

Q When you say "marketing for use" you've had occasion not only to be in the store but to cause measures to be taken prior to enactment of the ordinance, isn't that correct?

A Yes, that is correct.

Q What signs existed telling people what the use of these items were?

A I don't recall. If you wish to refresh my memory—

Q I will show you what has been marked as Item No. 16 for identification purposes and ask if you can examine that and describe that or if you know what that is?

A It looks like a large clothespin. It closes tight on an item, similar to the last item you showed me.

Q Now were you aware or did you see any of these items for sale in Flipside Records prior to May 1, 1978?

A I don't recall seeing that item.

Q And if these items were present there, is it [69] the import of your ordinance to legislate the control and regulate the control of these items if they are sold in the same areas as cigarette papers?

[69] A Not cigarette papers alone.

Q If sold in the proximity of the cigarette papers and literature?

A There is nothing wrong with literature, per se.

Q Well, you have described literature encouraging the use of marijuana and other illegal drugs, is that correct?

A That's correct.

Q Does your ordinance or statute give any guidelines so that one may tell what such literature is?

A No, no guidelines have been drawn to define that and the literature itself has not been regulated in any manner.

Q Then whether or not a piece of literature encourages the use of illegal drugs and whether they would be subjected to the license if sold in the proximity of pipes then, would be in the discretion of whom and how would one establish that?

A It would be set up by administrative procedure as to the manner of marketing. I think that is the reason for the guidelines.

[70] I do recall a picture showing one piece of literature—now I may be wrong—that had something to do with the use of cocaine and something to do with "A Child's Garden of Grass" or marijuana. Those things struck me as items, when displayed with the others, that are marketing the items that you have shown me, No. 1 and No. 16 to be used—

Q The hemostat, No. 16 and the glove stretcher?

A Right, to be used with cannabis, other types of drugs, rather than tobacco oriented products.

Q Did you read either of those books?

A No.

Q Were these items referred to in those books?

A I have no idea.

Q In fact, did any of those books encourage the use of any marijuana or illegal drug?

A I have no idea.

Q So it was judged solely on their titles?

A The manner of display and marketing is what we were concerned about.

Q Let us get to the manner of display. How were these books displayed, in a wire rack?

A As I recall, they were placed behind the glowing and colorful items similar to those on your table, [71] in one particular area of the store.

Q That was the cash register?

A Well, I think there is one towards the front and this is one towards the side. There may be two cash registers. The record sales and ticket sales were primarily at the front of the store. As I recall, these were on the west side of the store.

Q And so the proximity of literature to these other items may create the store falling under the ambit of the ordinance and a tax would have to be paid, is that correct?

A The marketing effect, yes.

Q Now is there a difference as to whether or not there is a certain design or a decal would be on some of these items as to whether or not it would be intended for use with marijuana or illegal drugs?

A Maybe the identification, in our opinion, is more readily identifiable as an item designed for the use with illegal drugs because of the language on the items.

Q For example, was it intended by the ordinance to regulate certain cocaine paraphernalia which you believe to be cocaine paraphernalia?

A I believe that would fall under illegal drugs under Illinois Revised Statutes. I frankly have no idea what cocaine paraphernalia is. I don't know how it is used or what cocaine is.

[72] Q Well, could they sell things which you determined to be cocaine paraphernalia?

A Under this definition, no.

Q How would one know whether certain items were, in fact, cocaine paraphernalia?

A Based upon the experienced and trained observer giving us advice prior to our administrative hearing.

Q Have you ever heard the expression "cocaine vial"?

A No.

THE COURT: Cocaine what?

MR. LEAVITT: Cocaine vial.

BY MR. LEAVITT:

Q Have you ever heard the expression of a "cocaine mirror"?

A No.

Q Were certain of the items which were exhibited for display also exhibited as jewelry items?

A They could have been. I don't recall.

Q Let me show you what has been marked as Exhibit No. 12 for identification purposes.

A What number was that? Okay.

Q Would you describe Exhibit 12?

A It looks like earrings.

Q Would your ordinance intend to regulate the control or sale of these earrings?

[73] A No, counsel, unless—because I have such a limited knowledge of drugs and trained and experienced officers could tell us that they found those items used with some exotic substance and that is the purpose of them. My own opinion is that it looks like earrings to me.

Q If, in fact, they were earrings whose use could also be roach clips, would their sale be regulated?

A I don't think that would necessarily make it presumptive. There must be rational, logical connections between what we find and what the use is.

Q Suppose, for example, that those same items were contained in Exhibit No. 10. Would you describe Exhibit No. 10 to the Court and for the record, please?

A It says "Roach clip earrings."

Q And on the back it says "Express yourself in genuine miniature roach clip earrings, 100 percent handcrafted."

A With quality—

Q Would these items be regulated under your ordinance?

A I don't believe so, unless an expert trained and experienced in the field could say that he has found those to be used with illegal cannabis and drugs. Those state they are miniature and it may simply be a cute type of [74] earrings mimicking something that is illegally on the market.

Q Well, how do we know under the ordinance when a roach clip is designed for use with illegal drugs prior to the time the merchandise is displayed?

A Based upon a regulation hearing wherein all merchants within the community would have an opportunity to cross examine and question the trained and experienced observer who has stated, signed by affidavit, that these items have been found to be used primarily with illegal cannabis or drugs.

Q In other words, there would have to be a hearing on each and every item?

A Conceivably.

Q In your other 80 items which you regulate, such as milk, does every time milk comes in—is there a new hearing?

A Every time we change a regulation on milk we have an administrative hearing.

Q What are some of the other 80 things that you regulate?

A Service stations, hospitals.

Q Are there any other retail establishments that you regulate and require each and every item to be [75] subjected or submitted to a hearing on prior restraint as to whether or not that item may be sold subject to regulation?

A A department store, we may examine the various departments. If they have a bakery, if they have a pharmacy, if they have various departments, they would need separate licensing. Those would be some general items of what constitutes a pharmacy, you know. We would have to look a little further.

I think I can say we don't look at every item of every store. All this ordinance certain contemplates we may well have to regulate items designed and marketed for use with illegal drugs or cannabis.

Q Now let me show you again Exhibit No. 10, the roach clip earrings, holding a hand-made tobacco cigarette. Is this the function you described your roach clip served?

A That is correct.

Q So that earring also serves that purpose, doesn't it?

A Apparently so.

Q Now it has a dual purpose, either earrings or roach clips. Is it covered under the ordinance?

A Only if I have evidence from a trained and experienced officer that can state there is that logical and rational condition in more—well more then a majority of cases where he has observed its use.

[76] Q So, in fact, any specific roach clip may be sold or, rather, there has to be a hearing on each and every thing that may be used as a roach clip to discern whether or not it is, in fact, designed or marketed for use with marijuana?

A Not necessarily, counsel. If a store determines that it needs such a license and sells one or more items then it must have that license, whether it is one item or 100 items.

Q Are you familiar with the alligator clip type of roach clip?

A Not offhand.

Q Do you know what an alligator clip is?

A I know what it is in electronics.

Q If you were told, for example, that this Plaintiff's Exhibit No. 6, which is a keychain with an alligator clip attached, is commonly used as a roach clip, would that item then be regulated under your ordinance?

A Yes, it would.

Q It would then be unlawful for somebody under 18 to buy that keychain with an alligator clip attached?

A If it is designed and marketed for use with illegal drugs or cannabis, yes.

Q The design hasn't changed, it is a keychain with a roach clip, is it not—that is, an alligator clip?

[77] A Yes.

Q And what would be the other aspect to consider then, market it? Then it would matter, counsel, who marketed the item or how they marketed it?

A Not necessarily. The ordinance says designed or marketed.

Q Would you regulate, for example, Plaintiff's Exhibit No. 18 which are alligator clips shown in an Ace Hardware Store in your town?

A No, it looks like it is designed and marketed for use for electrical connections.

Q They are, in fact, a selection of alligator clips, is that not correct?

A That is correct.

THE COURT: That is exhibit what for the plaintiff?

MR. LEAVITT: That was Exhibit 80, your Honor.

THE COURT: 80?

MR. LEAVITT: Yes, sir.

BY MR. LEAVITT:

Q What design differential between the alligator clip displayed in Exhibit No. 6 and the alligator clip displayed in No. 80?

A The design and marketing of the—

Q I asked only about design. Is there any [78] design differential?

A No.

Q Now if I were to tell you that Exhibit No. 6 was sold in a Flipside Records without any signs but merely there where literature was displayed, where the literature that contained, The Child's Garden of Marijuana or whatever other literature they displayed, would it then be a regulated item?

A It would be if an officer could tell me that it can be used or is presumed to be used for illegal cannabis and drugs.

Q Does your ordinance contemplate control or regulation of those things which you have defined in the guidelines under your words as "roach clips"?

A The ordinance regulates paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs. It does not specifically state roach clips.

Q I was referring to the guidelines which specifically says—

A Those that are designed for use with illegal cannabis and drugs are therefore covered.

* * * *

[82] Q Are those papers regulated?

A Under my guidelines, based upon the fact that I have observed farmers using white paper and why I specifically exempted that without a hearing and due process, I drew up the opinion that white paper would not be regulated and that is white paper.

Q You talk about due process. Apparently there is some part in your ordinance that indicates that there is an administrative right to regulate each and every item they intend to sell. Is that set out in the ordinance in question?

A It is Section E. "The applicant shall comply with all applicable regulations of the Department of Health Services and the police department. Those regulations have not yet been issued because we have had no applicant for a license as yet. And those regulations are then governed by a separate ordinance that is similar to your Federal Estate Administrator's Procedures Act that gives notice and hearing.

Q And that would be on each and every item in this?

A In this case it may very well be.

THE COURT: May I ask, where is the Administrative Procedures reviewed under this ordinance?

THE WITNESS: At the Village Hall by the village department head.

THE COURT: All right.

MR. LEAVITT: Let me have one second.

BY MR. LEAVITT:

Q Now the only guidelines that have been propounded to date are the guidelines you have prepared, is that correct, with regard to the ordinance?

A These were the initial guidelines that—yes, those are the only ones that I am aware of as to health. I believe the police did hold a hearing, the police chief did promulgate some regulations, if I recall. You may well want to question him on that.

Q Now the expression, "After all, it is only a weed that turns to a flower in your mind," did it in any way affect the marketability of Exhibit 69, the white one and a half cigarette papers?

A It affects the marketing but I don't think we can [84] make the presumption. We may be able to. The white paper is presumed to be used for cannabis. That is required under our ordinance.

Q Have the regulations been propounded so that individuals who are selling merchandise—have notice of what may or may not be covered under the ordinance, other than those guidelines which you have issued?

A No.

Q So then the only thing the public has notice of is that which has already been issued, is that correct?

A At this point, yes.

Q They may be selling these very same items but not have a license?

A Correct.

Q Because of compliance?

A I don't understand "Because of compliance."

Q Well, that is, for example, they may sell literature in a separate part of the store so they can avoid the $150 tax?

A They could.

Q And the only thing they would have to do in some instances is just move the literature to a different part of the store to avoid the tax?

A That would affect the marketing.

* * * *

[87] Q Then were they given notice of specifically what items constituted a violation?

A They were given notice of the ordinance.

Q Only the existence of the ordinance itself?

A That is correct.

Q In fact did you have any conversation with one of the principals of Flipside?

A He has called me on the phone several times.

Q That was Mr. Larry Rosenbaum?

A Larry or Carl, I don't remember the name.

Q Do you recall a conversation taking place specifically on April 27, 1978 at approximately 1:20 p.m.?

A Please refresh my memory.

Q Did you make any notes of the conversations that took place between Larry Rosenbaum and yourself?

A Never.

Q Did you have any conversation about what items should be covered and what items the sale of which would require signing the police register?

[88] A I may have. I don't recall.

Q Do you recall Mr. Rosenbaum telling you he was unclear about what items were covered and you stated that it would be best if a retail record be used for all items in the section or area of the store whether covered or not?

A For his protection, yes.

Q So in fact when he called you for guidance as to what items would be covered and for the sale of what items they had to sign the police book, you advised him to sign it for everything just to make sure, isn't that correct?

A That may well be.

Q Did you tell him or did anybody advise him specifically when a police register was necessary?

A We had the register prepared for anybody that applied for a license. Nobody applied.

Q But he told you he didn't know when it was appropriate and when not, and you said "Well, then, always use the register," isn't that correct?

A It may well be.

Q Would that not have affected the rights of some individuals who may not have had to sign the police register? That is, the items they bought, an adversary hearing would have proved was not covered under the ordinance?

[89] A Yes, but the ordinance had not been implemented at that time.

Q When you say it had not been implemented, did not, in fact, an inspector from the Health Department go around and tell these people that they couldn't sell covered items without a license?

A I don't know what he told them.

Q You indicated that a health inspector went around and advised 13 or 14 establishments that they needed a license to sell certain things.

A No.

Q I am sorry. If I misunderstood you, please—

A I requested the health officer to see if under these guidelines and the ordinance they were selling them and provide them a copy of the ordinance.

Q So then it would be up to the understanding and comprehension of the individual store owner to know whether or not the items he was selling were intended or, in fact, were covered under the ordinance, is that correct?

A At that point, yes.

* * * *

[93] Q How would a person know whether or not he was covered under the ordinance by virtue of the items he was selling; that is, whether or not the items that he sold were decorative jewelry such as roach clip earrings, glove stretchers or other items, or whether or not they, in fact, were roach clips as covered by the ordinance and he required an application?

A That again would depend, as I spoke about that one earring, on the marketing aspect of the item.

Q When you say the marketing aspect, you referred to this often; what is the key in the marketing aspect and how is that reflected in the ordinance?

A The ordinance only refers to the marketing. The key is when you have all of those items such as that are on your table, one through 80, many of which when displayed with tobacco, displayed elsewhere in the store, may well not be designed and marketed for illegal use, but when displayed together create one marketing concept of illegal use with illegal drugs.

Q So proximity alone is sufficient to change the existence of—rather, the relevance and category of an item, the rubric under which it falls, from an uncovered to a covered status, is that correct?

A That is correct, under the marketing requirement.

[94] Q What are the guidelines that you propounded with regard to pipes?

A If displayed away from the proximity, non-white paper, tobacco oriented paper, and not displayed within proximity of roach clips or literature encouraging use of cannabis or illegal drugs, are not covered; otherwise covered.

But what we are saying is those papers that we may smoke with tobacco in contemplation displayed with tobacco clearly have the presumptive use of being used with tobacco. I think the nature of the marketing changes the presumptive use when they are placed with other items such as roach clips and those mentioned that would be illegal.

Q Take Exhibit 45 which purports to be a Meerschaum pipe. The evidence will establish that Exhibit 45 is such a pipe as was sold by Flipside Records prior to the enactment of the ordinance and prior to the time they were notified they fell within the ambit of the ordinance. Take Exhibit 16 and Exhibit 1. That is the hemostat which I referred to as clamps because I couldn't spell hemostats and the glove stretcher.

Now has the character of the pipe changed in any way?

A Of course not.

[95] Q Has this relationship to the ordinance changed in any way?

A Yes.

Q What is that?

A It was placed with other items that in and of themselves may be inoccuous but when taken together such as one that

could be used with electrical connectors, one to stretch gloves and one for mere pipe smoking and marketed not in the pipe rack department, not in the glove stretching department, but marketed together, falls—or becomes the presumption that these are being marketed for illegal use.

Q Now you said that you didn't recall any signs with regard to indicating that these were for use with illegal drugs, is that correct, in Flipside prior to May 1st when these items were displayed?

A No, I don't remember such a sign.

Q Would the same be true of all pipes, whether they be Meerschaum or corn cob pipes such as displayed in Exhibit No. 61, in terms of their relationship to the ordinance if displayed next to other merchandise that they would be covered and an extra license would be required?

A I think that would create the marketing aspect of the marketing—of the ordinance.

* * * *

[97] VIRGINIA M. HAYTER,

a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: Please be seated. State your full name for the record and state your last name, please.

THE WITNESS: My name is Virginia M. Hayter, H-a-y-t-e-r.

DIRECT EXAMINATION

BY MR. LEAVITT:

Q You are the President or the Mayor?

A I am Village President.

Q Of Hoffman Estates?

A Yes, sir.

[98] Q And you were so employed on May 1st, 1978 when this ordinance which is the subject matter of this action became effective?

A Yes, sir.

Q As a matter of fact, you broke a tie vote of the Village trustees in order to enact the ordinance, is that correct?

A Yes, sir.

Q Were you aware of any guidelines that were propounded in order to supposedly clarify the ordinance for merchants in your town so that they would know what action was required of them to comply?

A I am not aware of the specifics. I do know the village manager was detailed to work with the attorney, Mr. Williams, to do so.

Q And those guidelines were to explain the ordinance and to give notice as to what was required of people in order to fall within lawful conduct under the ordinance, is that correct, to know what was expected of them?

A In a general way, yes, sir. That is standard operating procedure for any new ordinance.

Q What is paraphernalia designed or intended for use with illegal drugs?

A I am not an expert in that. I could not answer that question, sir.

* * * *

[111] Q You are prohibiting the sale of these things to minors, isn't that correct?

A In that sense, we are saying—in that instance, yes.

Q Fine. Then you are prohibiting in some instances and you are regulating it in others; do you prefer that better?

A I think that would be a truer—

Q All right. What is it that you are prohibiting and/or regulating?

A The ordinance attempts to—not to encourage people to break the law by encouraging the manufacture and the sale, the distribution of illegal substances and in this sense, that is what we were attempting to do for the health and safety of the community.

Q In other words, the purpose of this ordinance was to control the use of drugs.

A No.

Q Well, you said illegal substances.

A To make sure that we didn't aid and abet, that [112] the village aided and abetted that. Drugs are illegal.

Q Well, did you regulate by this ordinance any drugs?

A Specifically?

Q Yes.

A No.

Q What is it that you did specifically regulate?

A We license the paraphernalia, the materials that could be used illegally.

Q Now when you say "could be used," it is that that I want you to explain. Will you please describe what could be used with illegal drugs?

A A great many items.

Q And is the sale of all of them—

A Specifically made for that purpose.

Q And how would one know if something is specifically made for that purpose?

A In the general—now I have to speak as a lay person and not as an expert. As a parent of five children and as a mayor—

Q I am sorry.

MR. LEAVITT: I ask that that be stricken as not responsive.

* * * *

[115] Q Now this item—

A We have few stores that sell gloves in our community.

Q In other towns where you may have bought gloves outside of Hoffman Estates?

A No, I have never seen that.

Q If this item were sold in conjunction with other things—well, say it was sold with the hemostat. Would this be, from your viewpoint, covered under the ordinance, that is, Exhibit No. 16?

MR. WILLIAMS: Objection.

THE COURT: What is the objection?

MR. WILLIAMS: I don't see where this line is going as to where the legislators make a determination in this court as to each item speculatively whether, in fact, what they intended.

THE COURT: No. The objection is overruled. The plaintiff apparently has a theory about this. Let the question be asked and let us find out if we can. The objection is overruled. Proceed.

BY THE WITNESS:

A Please, will you ask the question again?

THE COURT: Would you repeat the question or have the court reporter read it.

MR. LEAVITT: I will ask the reporter to read it.

[116] (Question read.)

BY THE WITNESS:

A No, I don't think so, now that you have told me what its purpose is and the purpose happens to be for usage in a glove shop.

BY MR. LEAVITT:

Q Suppose this item were sold at the Flipside Records next to this rolling papers prior to May 1st; would you have a license in order to sell Exhibit 16?

A I can't answer that question because—

Q Is that because the definition of paraphernalia is too vague?

A No. Because I don't believe—I don't believe that that particular item would be an item that would be sold for the use. I don't think that kind of an item would be sold. The hemostat may very well be because yesterday I saw a hollowed out bolt that was used in illegal drug usage and nobody would have assumed that that machine bolt held cocaine, but it did.

Q Now, if Flipside Record sold that machine bolt, would they need a license to do it, to sell those things?

A Of course not.

* * * *

[120] Q So, in fact, then your ordinance contemplates regulated colored or flavored papers but not plain white paper?

A I haven't read the ordinance in some months but as I recall, there is a differentiation in papers. I can't recall what they are, sir.

Q Would you like a copy of the ordinance and the guidelines to refresh your recollection?

A I have never seen the guidelines. As I told you, they were prepared under the direction of the Board to the village manager. The village manager works in conjunction with the attorney. Those guidelines, as far as I know, have never been enforced, nor have they ever been reviewed for the simple purpose that Flipside chose [121] this route rather than to discuss. So I have not seen the guidelines, sir. I do not know what they are.

Q Are white cigarette papers such as displayed in Exhibit No. 68, such papers as you described before that would not be regulated by the ordinance?

A I don't know whether or not this particular one would be, sir. As I recall, the discussion was that most of the foreign papers have a higher—what is it, burning capacity and, therefore, many of them are used because of the need with drugs, to have a better ash.

So, it may very well be because this is, as you put in front of me, one made in France, it may very well be that this would be one. I do know that there are others that we were not given specifics on but we were given the general item.

Q What effect would papers have that have such things on them that "after all, it is only a weed that turns to a flower in your mind," such as the papers on Exhibit No. 69?

A I think among the younger generation, that would be considered a take-off on, you know—they look at these things differently, whether or not they are legal or illegal and to some it would mean one thing and to some other people it would mean some other things.

* * * *

[127] Q I am talking about literature right now.

A All right.

Q If that were contained in literature that was sold at Flipside, would that be the type of literature which you described as encouraging—

A We are talking about displaying literature that—

Q Let us say that book is displayed.

A —that encourages the illegal use of drugs.

Q Would you say that encourages the use of cocaine?

A That gives one person's opinion about what cocaine meant to him.

Q What does encouragement in order to fall into the ordinance require? How does one know if literature is encouraging?

THE COURT: I think we have gone far afield in this matter now.

MR. LEAVITT: Your Honor, if I may.

THE COURT: I have been reading this ordinance as the questions have been asked. The ordinance has nothing to do with literature.

MR. LEAVITT: Your Honor, it does, if taken in conjunction with the guidelines with the guidelines which place a tax on literature which is in the area. The guidelines are essential.

* * * *

[129] MR. LEAVITT: Except if I sold that literature in the back of the store, I would still have no tax. If I sell it in the front of the store, I now have to pay $150. What is being taxed, the pipes which I was already selling or the literature which I have now added?

THE COURT: $150 for what?

MR. LEAVITT: For the license to sell paraphernalia, because under the ordinance, your Honor, pipes if dis-

played away from the proximity of non-white paper or tobacco oriented paper and not displayed within the proximity of roach clips or literature encouraging—

THE COURT: By the way, have you gentlemen agreed about all this? Do we have to hear any evidence about all this? This is not a subject of disagreement it seems to me, because what this ordinance says and what these guidelines say is a matter—I can read these guidelines. I don't need any witness to tell me what papers, what roach clips are and what pipes are. I know the meaning of paraphernalia. I don't need any witness to tell me because the general rule of construction is that any legislative enactment, whether it is an ordinance or a statute, no matter how the words might have been intended, they are to be given their ordinary meaning which the ordinary person

* * * *

[132] You notice it is after 4:00 o'clock and we have just started. This case was set for hearing today on the representation that it wasn't going to take long to hear. That's the only way I set cases like this.

MR. LEAVITT: I am sorry, your Honor. It was my understanding that if we couldn't complete today, successive Fridays—

THE COURT: I know that, yes, yes.

MR. LEAVITT: And I had contemplated—

THE COURT: That is all right, but yet—that is all right. How many more Fridays do we have to go along with this, that's what I want to know. I think a lot of it can be shortened by stipulation and agreement.

MR. LEAVITT: May we, if the Court would because of the hour in mind, excuse the witness now, I will recall her again. Perhaps we can—

THE COURT: All right. Do you have any questions you want to ask this witness, Mr. Williams?

MR. LEAVITT: I know that I am not through with her, your Honor, assuming that we can stipulate.

MR. WILLIAMS: Counsel, how much longer? I hate to bring her back to Chicago.

* * * *

[139] Q You indicated drug paraphernalia.

A Manufactured for that purpose and marketed for that purpose.

Q How does one know that?

A There is a whole industry that manufactures. You can get catalogs of that industry. You can get—there are suppliers of that.

MR. LEAVITT: For the purposes of the record, your Honor, at this point there has been offered a written stipulation by and between the parties that Exhibit 1 through 80, except to the extent that they will subsequently be specifically identified by me, were items that were sold by Flipside Records at the time of the enactment of the ordinance and which they have stopped selling generally except for some pipes which I will again specifically identify, subsequent to the enactment of the ordinance. So when I refer to them, your Honor, with the evidence I will submit a new list to the Court which identifies each item specifically as to whether or not it is a Flipside item or some item that was purchased elsewhere.

THE COURT: All right.

[140] BY MR. LEAVITT:

Q Now let me show you again—

THE COURT: Is it stipulated by the parties that these exhibits may be admitted by the Court?

MR. LEAVITT: Yes, your Honor.

(Said exhibits, so offered, were received in evidence as

THE COURT: All right, proceed.

MR. LEAVITT: I am sorry.

MR. WILLIAMS: Yes, subject to written memorandum directed to identify certain items.

MR. LEAVITT: Yes, subject to my identifying specific—

MR. WILLIAMS: We are generally stipulating at this point.

BY MR. LEAVITT:

Q Let me show you a pipe which was sold at Flipside Records as Exhibit No. 45. Will you describe that pipe, please?

A It is a clay pipe and it has a plastic stem. It is made in Turkey. It has a very small hole. It is not like the pipes that my husband has.

Q So you consider, for example, that the pipe 45 was—Exhibit 45—was a pipe made or intended for use with [141] something besides tobacco?

A I would presume so because I have never seen a man use that kind with regular tobacco but I am not sure if that pipe is manufactured and displayed for the purposes that that ordinance says.

Q What if that pipe were displayed with no signs indicating what it is used for? Would it then be covered under the ordinance, would it be marketed?

A If that pipe were to be used with an illegal substance and if it were marketed and made for that reason, yes, it would be included in that ordinance.

If that pipe appeared as an item I would think in a catalogue of drug paraphernalia then I think that that would be a way to ascertain whether or not it was within that ordinance, sir.

Q Are scales drug paraphernalia?

A Pardon?

Q Are scales drug paraphernalia? Flipside sold an assortment of scales. They sold them near literature, pipes and papers. Are scales sold by Flipside, in your opinion, drug paraphernalia?

A In the instance of all of that material, I would say that they were encouraging the use of drugs and in that instance those scales are probably the kind of scales that would be used for illegal drug usage. That is what [142] their purpose of marketing is and that is what their purpose and general use was. Flipside is not a drugstore. It is not a diabetic store. It has a whole section devoted to drug paraphernalia and more than one section.

Q If I asked you to describe what it is and we have talked about pipes—are pipes drug paraphernalia?

A Some pipes are.

Q What type of pipes are drug paraphernalia?

A As I told you, there are certain kinds. That kind I have never seen used for ordinary tobacco. It may very well be, but I doubt it very much. I think that a good usage would be, is it included in a catalogue of drug paraphernalia.

But, as I said, I am not an expert. I rely on those people who know what drug paraphernalia is, per se. I know generally what I think drug paraphernalia is. In the instance of Flipside,

you asked me if I had gone in. Yes. That store has a very definite big display in several areas of drug paraphernalia.

Q I would like you to look at what I would ask be noted as Exhibit 81 and ask if you would describe that?

A It is a pipe.

Q How would you compare the size of the apperture at the top with the pipe, Exhibit No. 45 which you saw before?

A The same size.

Q Would you say then that Exhibit No. 81 was designed, [143] intended and marketed for use with marijuana and other illegal drugs?

A I don't know.

Q Well, you said it was the size that was crucial, about 45, isn't that correct?

A No, I said the inside was different than pipes that I have seen before. When you clean out my husband's pipe, it has a very definite way of being able to be cleaned out and that pipe does not appear to me—the hole, the little hole down there doesn't appear to me to be the kind that my husband's pipes have. That is what I was talking about. I wasn't talking about the top one. I was talking about the little hole.

THE COURT: This is getting to be argument now. This is just an argument between the lawyer and a witness.

MR. LEAVITT: I'm sorry, your Honor.

BY MR. LEAVITT:

Q Are you familiar with what are commonly called postal scales?

A We have postal scales of various kinds in the village hall.

* * * *

[151] THE COURT: Any cross examination?

MR. WILLIAMS: No, your Honor.

THE COURT: Thank you.

THE WITNESS: Thank you, sir.

(Witness excused.)

THE COURT: Did you say you had one more witness you wanted to get through with tonight?

MR. LEAVITT: It is the Chief of Police, your Honor. I could get to him the next time. There is no urgency from my viewpoint. It is for the convenience of Court and counsel.

THE COURT: Now, next Friday I'm going to try to arrange it so that you have more time and we can begin earlier.

MR. LEAVITT: Your Honor, I was going to ask your Minute Clerk, would it be possible if I had no time next Friday that we skip next week? I had a previous matter set.

THE COURT: Well, discuss that with Mr. Anderson.

Now let me take up another matter with you. I entered an order in this case at the time I heard the motion for preliminary injunction, requiring the parties to propose findings of fact and conclusions of law. Now in view of the fact that we are doing the case now on the merits and in view of the provisions of Rule 52(a) which requires the Court to find facts specially and state separately its conclusions of law, the parties are going to be asked to submit, at the conclusion of this hearing, proposed findings [152] of fact and conclusions of law. So, be prepared to submit those to me because I want to look at them and see what facts you think should be found from the evidence.

MR. LEAVITT: Yes, sir.

THE COURT: All right.

MR. WILLIAMS: Yes, your Honor.

THE COURT: We can now adjourn and reconvene either next Friday or the Friday after next. Talk to Mr. Anderson about that detail.

All right, thank you.

(Thereupon at the hour of 5:10 p.m., and adjournment was taken.)

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 78 C 2114 Date February 15, 1980

Title of Cause

The Flipside, Hoffman Estates, Inc., an Illinois Corporation v. Village of Hoffman Estates, a Municipal Corporation

Brief Statement of Motion

Order entering judgment for defendants and against plaintiff in accordance with Memorandum filed this day.

Reserve space below for notations by minute clerk

Cause having been submitted for decision by the court without a jury, and in accordance with the Memorandum filed this day, said Memorandum complying with the requirements of Rule 52(a), Federal Rules of Civil Procedure, the court having found in favor of defendants and against plaintiff, orders the clerk, in accordance with Rule 58 to enter judgment in favor of defendants and against plaintiff, costs to follow the judgment in accordance with the statute.

Docketed February 20, 1980

/s/ Leighton, J.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

PETITION FOR REHEARING OR AMENDMENT OF JUDGMENT
(Filed February 25, 1980)

NOW COMES the Plaintiff, THE FLIP SIDE, HOFFMAN ESTATES, INC., by and through its attorneys, STROUP, GOLDSTEIN, JACOBS, JENKINS and PRITZKER, by Michael L. Pritzker, and moves this Honorable Court, pursuant to Rule 59(a)(2) of the Federal Rules of Civil Procedure, to reopen the above-entitled cause, allow additional briefing in response to the Court's opinion, and to amend its judgment entered herein. In support whereof, your Petitioner, represents and alleges:

1. That hearings were held before this Honorable Court on March 23, 1979 concerning your Petitioner's claim for declaratory and injunctive relief pursuant to 42 U.S.C., Section 1983 and 28 U.S.C., 2201 and 2202 at which testimony from numerous witnesses was heard.

2. That in addition to the evidence adduced at said hearings, the parties entered into various stipulations concerning matters not in dispute which were also submitted to this Honorable Court and made a part of the trial record.

3. That, on May 15, 1979, your Petitioner filed, with the United States District Court of the Northern District of Illinois, Plaintiff's Exhibits 1-85, which had been obtained from numerous local merchants including Flip Side Records, Adam's Apple, S. S. Kresge, Osco and Ace Hardware. (A "List of Exhibits and Sources" is appended hereto as Exhibit "A".)

4. That this Honorable Court entered a judgment in the above-entitled cause in favor of the Defendants, and against Plaintiff, and issued a Memorandum Opinion therewith on February 15, 1980.

5. That your Petitioner believes that, in reaching its judgment, this Honorable Court has inadvertently relied upon certain assumptions regarding the use of drugs which are at substantial variance with the testimony, stipulations and exhibits that form the trial record in this cause.

6. That your Petitioner submits further that the influence of these assumptions has resulted in this Honorable Court overlooking or misapprehending certain important matters, and, in support of this general assertion, Petitioner submits in particular:

A. That the Court has concluded that the language of the Ordinance which describes merchandise proscribed as: "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" are ordinary words capable of ordinary understanding and adequately convey the scope of the Ordinance. Your Petitioner submits that no clear standard could be agreed upon by the Defendants and that the evidence clearly established that each attempt at application exposed the ambiguity inherent in that phrase.

B. That, by concluding that the term "paraphernalia" is a term readily comprehended by persons acquainted with the drug culture, the Court assumes that some actual relationship has been established between a merchant who will be required by law to conform his conduct to the Ordinance, and drugs. This assumption is at odds with the evidence which established that much of the merchandise which is vaguely described in the ordinance is commonly sold in traditional pipe and tobacco stores as well as many other types of ordinary retail outlets.

C. That the court has misapprehended the significance of your Petitioner's arguments in that where individual items cannot be identified as "paraphernalia" in and of themselves, it is impossible to determine that some undefined quantity, combination or grouping of these items in proximity will create the essential "item-drug" nexus which was previously lacking. It is uncontroverted in the record, for example, that the items offered for sale by Plaintiff that arguably fall under the ambit of the ordinance were displayed together to prevent their shoplifting. Included in said display and therefore converted to "drug paraphernalia" under the proximity "dominoe theory of paraphernalia" were such items as meerschaum and corn cob pipes.

D. That while concluding that the guidelines, which are part of the Ordinance, add specificity to the generic rubric "paraphernalia", the Court did not suggest a standard to cure the vagueness inherent in a "proximity" or "manner of display" standard, nor the relationship that some literature may have to merchandise displayed.

E. That by relying upon the proximity standard the Court did not take cognizance the import of the testimony of Village attorney Williams who testified on numerous occasions that the description "designed or marketed for use with illegal cannabis or drugs" was intended to be applied to items individually and therefore on a "per se" basis. The language of the ordinance in conjunction with the guidelines reinforces that theory.

F. That, in reaching its judgment that the ordinance is not unconstitutionally vague, the Court reasoned that it is reasonable to defer to an unidentified "expert in the field", while the testimony and stipulations establish that no representative of the

Village, including the attorney, who drafted the ordinance, and the Chief of Police, who is primarily responsible for its enforcement, could suggest a procedure or standard for making the critical determination in a uniform manner, and therefore could not reasonably guarantee that a uniform application was possible.

G. That the Honorable Court apparently inadvertantly did not notice that many of the exhibits 1-85 entered into evidence by Plaintiff and described by the Court as "paraphernalia" were in fact purchased from other merchants in Hoffman Estates who have not been nor will be required to comply with the restrictions of the ordinance, to-wit: S.S. Kresge, Osco and Ace Hardware. Thus, the mode of enforcement utilized by the Defendants during the pendency of this cause has restricted the sale of items by Petitioners and not those very same items when sold by other merchants.

H. That the Court misconstrued and misinterpreted the significance of the removal of certain items of merchandise from the shelves of its store in Hoffman Estates by deeming said removal as an admission of Petitioner's comprehension of the scope of the ordinance. Said removal was conducted solely for the purpose of avoiding arrest, involved the removal of any item that might foreseeably be considered drug "paraphernalia" under the sweeping and overinclusive language of the ordinance, and was a legal necessity since an arrest by local police would raise difficulties under the abstention doctrine that might preclude the choice of a federal forum for the adjudication of Petitioner's constitutional claims. Since other merchants were not prohibited from selling these very same objects it is obvious that it was not the objects themselves which Plaintiff feared but the way Defendant interpreted the ordinance against it.

I. That this Honorable Court, although aware of a recent decision by a Three Judge Court which reasoned persuasively that "designed" for drug use language fails to convey that specificity essential to satisfy the due process requirement of prior notice, did not address the reasoning of that ruling or other decisions holding such general language unconstitutional. Plaintiff submits further that the same lack of specificity arises under "marketing" for drug use language.

J. That this Honorable Court has misapprehended the First Amendment claims and arguments of Petitioner thereby not dealing with the direct and indirect censorial impact that the Ordinance will have upon protected expression and the marketing of literature and books. The record reflects, for example that although Plaintiff also carried much non-drug literature such as Rolling Stone and National Lampoon, the presence of some drug message literature was considered significant.

K. That this Honorable Court did not touch upon the "bootstrap" effect of the ordinance which will result because the "marketing intent" will be inferred from the items, in and of themselves, even though the Village vascillates between the significance or lack of significance of such a rule. The ordinance creates a "per se" restriction, and irrebuttable presumptions, that cannot be justified as necessarily valid in fact, flow therefrom.

L. That by focusing the import of the ordinance on "marketing"—whatever that is—the Defendant must abandon the position that the ordinance seeks to regulate merchandise. Since the ordinance does not

regulate all pipes or cigarette papers, for example, this ordinance varies from the dairy example proffered by the Village because in that instance all milk, regardless of marketing technique is regulated.

WHEREFORE, your Petitioner respectfully requests that this Honorable Court reopen the above-entitled cause, allow additional briefing in response to the Court's opinion, and amend its judgment entered in this matter.

Respectfully submitted,
/s/ Michael L. Pritzker
Michael L. Pritzker
STROUP, GOLDSTEIN, JACOBS, JENKINS & PRITZKER
Attorneys for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

EXHIBIT A

Legend:

i	Merchandise displayed and sold by Flip Side, Hoffman Estates, Inc., Plaintiff, prior to May 1, 1978, the effective date of the subject ordinance. (Stipulation of Larry Rosenbaum) and distributed by Adam's Apple Distributors, Inc.
ii	S. S. Kresge and Co., Hoffman Estates, Illinois.
iii	Osco's, Hoffman Estates, Illinois.
iv	Ace Hardware, Hoffman Estates, Illinois
v	Source of item missing.
vi	Cellini's Fine Pipes, 308 West Randolph St., Chicago, Illinois.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

PETITION TO RECONSIDER AND AMEND JUDGMENT, OR, IN THE ALTERNATIVE, FOR INJUNCTION PENDING APPEAL. (Filed March 21, 1980)

NOW COMES the Plaintiff, THE FLIPSIDE, HOFFMAN ESTATES, INC., by and through its attorneys, STROUP, GOLDSTEIN, JENKINS & PRITZKER, by Michael L. Pritzker, and moves this Honorable Court, pursuant to the general allowances of Rule 59(a)(2) of the Federal Rules of Civil Procedure, to reconsider its judgment in the above-entitled cause in view of the judgment of the United States Court of Appeals of the Eighth Circuit in the case of *Robin Geiger v. City of Eagen,* et al., No. 79-1831 (March 19, 1980) which held an Ordinance, *similar* to the subject Ordinance, entitled Village of Hoffman Estates, Ordinance No. 969-1978, facially vague and overbroad, and therefore unconstitutional. In the alternative, Petitioners seek an injunction pending appeal, pursuant to Rule 8 of the Federal Rules of Appellate Procedure and Rule 62 of the Federal Rules of Civil Procedure, of the subject Ordinance.

In support of this motion, your Petitioner respectfully submits the following:

1. That your Petitioner is the Plaintiff in the above-entitled cause of action.

2. That this Honorable Court entered a judgment in this matter in favor of Defendant, and against Plaintiffs, and issued a Memorandum Opinion therewith on February 15, 1980.

3. That this Honorable Court denied Plaintiff's "Petition for Rehearing or Amendment of Judgment" on March 14, 1980.

4. That at the hearing concerning said "Petition for Rehearing or Amendment of Judgment," this Honorable Court stated that it was awaiting the decision of the United States Court of Appeals for the Eighth Circuit in the case of *Geiger* v. *Eagan, et al.*, but, in fairness to the parties and to avoid a delay in judgment, would rule without the benefit of the *Geiger* decision, then under submission before the Eighth Circuit Court of Appeals.

5. That subsequent to the aforementioned hearing, on March 19, 1980, the Eighth Circuit Court of Appeals issued its judgment in *Geiger* v. *Eagen, et al., supra* reversing the decision of District Court Judge Henry Alsop and granted an injunction and ruling the contested Eagan Ordinance facially unconstitutional. (A copy of the *Geiger* decision is attached hereto and made a part hereof.)

6. That Plaintiff has suffered and continues to suffer both economic and constitutional irreparable injury as the direct result of the enforcement of the challenged Ordinance No. 969-1978.

7. That Judge Alsop considered it appropriate to issue an injunction pending appeal in the *Geiger* case after his denial of the preliminary injunction in that cause.

8. That the standard for injunctive relief pending appeal is set out in Judge Alsop's second memorandum decision, attached hereto and made a part hereof, and that similar injunctive relief is appropriate in the instant matter pending appeal to the Circuit Court of Appeals of the Seventh Circuit, if Petitioner's Petition to Reconsider and Amendment of Judgment is denied.

WHEREFORE, Petitioner respectfully requests this Honorable Court to reconsider its judgment in the above-entitled cause, amend the judgment therein, or, in the alternative issue an injunction pending appeal of enforcement of the subject Ordinance No. 789-1978 of the Village of Hoffman Estates, Illinois, by Defendants and Defendants' officers, agents, servants, employees and all those in active concert with Defendants who receive notice of such order.

Respectfully submitted,

Michael L. Pritzker
STROUP, GOLDSTEIN, JENKINS & PRITZKER
Attorneys for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
Plaintiff,

vs. No. 78 C 2114

VILLAGE OF HOFFMAN ESTATES,
Defendant.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before The Honorable GEORGE N. LEIGHTON, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois on Friday March 14, 1980 at 9:00 a.m.

PRESENT:

MR. MICHAEL L. PRITZKER
(Stroup, Goldstein, Jacobs, Jenkins, Pritzker & Ware)
134 North LaSalle Street, Room 2100
Chicago, Illinois 60602

for the plaintiff;

MR. RICHARD N. WILLIAMS
Attorney, Village of Hoffman Estates
Hoffman Estates, Illinois 60176

for the defendant.

[2] THE CLERK: 78 C 2114, The Flipside, Hoffman Estates, Inc. vs. Village of Hoffman Estates.

MR. PRITZKER: Good morning, your Honor.

THE COURT: Good morning.

MR. PRITZKER: My name is Michael Pritzker for the plaintiff.

MR. WILLIAMS: Richard Williams for the defendant Village.

THE COURT: Mr. Williams, I wanted to hear from you with regard to the position of the defendant on this motion which is a petition for a rehearing and amendment of judgment. Did you want to answer the memorandum or did you want to be heard?

MR. WILLIAMS: I would like to be heard on one point that I would like to advise the Court for the record and that would be G that he has raised in his motion—

THE COURT: Yes, I find it.

MR. WILLIAMS: —regarding Exhibits 1 to 85 where in the Court's opinion he had stated they were all from the Flipside. I think I must agree with the plaintiff that 72 of these items were from The Flipside and the record and stipulations show that others were from some other shops and stores or other sources.

THE COURT: Well, let me tell you what I think. I [3] don't think that is important. I agree I will have to change the language of the memorandum. I misunderstood it because you know how this matter was heard. I started hearing evidence and then you gentlemen agreed on a stipulation. You submitted to me these exhibits and I had them brought from the Clerk's office. I called Mr. Pritzker's office and he wasn't in the office. I called you. And then I had to do the best I could to understand it. I thought that all of them were taken from the shelves of Flipside. If you tell me 72 were and not 85, I don't think that is important.

MR. WILLIAMS: I don't either, your Honor. I think other than that technical matter, the other matters raised here are those that were raised initially. It raised no new matter to the Court and I was not preparing to file an answer to this.

THE COURT: If that is the extent of this, I want to tell Mr. Pritzker I don't think there is any basis for me to change this ruling. Mr. Pritzker, I worked a long time on this matter. I don't mind telling you there are some cases I don't assign anyone to work on. I will have you know that every word of that somewhat extensive memorandum was written by me after examining every word of the record and every transcript that was available and a study of every single case and I came to the conclusion [4] that this case was different from all the other cases that I could find. If you think I am mistaken I will give you an opportunity to show me. I find no case in the United States where this matter has been handled in the same way. This ordinance is different from any enactment that has ever come to my attention anywhere in the United States.

MR. PRITZKER: Your Honor, the only case that the Court has indicated with regards to definiteness with regards to the word "paraphernalia" as having a well-known and specific meaning was the Johnson case which I think is clearly distinguished.

THE COURT: I know that.

MR. PRITZKER: Quite contrary, your Honor, I think that every other case considering the word "designed" or "marketed", vis-a-vis the word "paraphernalia" have held it to be unconstitutional. Now I would admit, your Honor, that no other ordinance seeks to regulate.

THE COURT: That's right.

MR. PRITZKER: But that doesn't add definiteness to the words.

THE COURT: Mr. Pritzker, I think this matter should be left to the Court of Appeals and if necessary, the Supreme Court of the United States. I remember when you first came before me I told you that I saw no vagueness in this ordinance and I studied it carefully and looked [5] at the dictionary, which is always a good book to read, and I came to the conclusion there is nothing vague about this ordinance and particularly when you bear in mind it is not a criminal enactment, it is a regulatory ordinance.

One thing that I didn't do that I wanted to do and since Mr. Williams is here, I will ask him, because I had to proceed on the assumption that I made from the record. You argue the point, Mr. Williams, that the Village of Hoffman Estates has regulatory ordinances involving some 80 different businesses within the Village of Hoffman Estates. Is that right?

MR. WILLIAMS: That is correct.

THE COURT: So therefore, as I take it, the Village of Hoffman Estates issues regulatory licenses to people who sell milk, butter, cheese and a large number of things and this one here is no different than the others.

MR. WILLIAMS: That is correct.

THE COURT: I would like to have seen the ordinance and I was tempted in the midst of my work to call you and I hesitated to do so, to ask you if you would let me see some of these ordinances the Village has adopted that regulate the sale, say, of milk, to see which way—as I understand it, this is just another ordinance regulating the sale of paraphernalia that can be used with drugs, [6] it is that simple.

MR. PRITZKER: If I may respond, your Honor—

THE COURT: Sure.

MR. PRITZKER: You have indicated it is probably not fruitful. Unlike those ordinances, I would bet, for example, that Hoffman Estates probably regulates all milk. However, this Court has found that the corncob pipe sold by plaintiff is paraphernalia and the corncob pipes sold virtually next door at

Osco, is not. Obviously then the Village does not intend to regulate all corncob pipes and so there must be some criterion or standard by which a merchant knows whether his corncob pipes are such to fall within the ambit of the ordinance.

THE COURT: Well, Mr. Pritzker, we don't live in a perfect world and I just want to tell you I spent hours and hours and hours on this. I even thought of waiting for the Eighth Circuit to decide the case in which you are involved. By the way, have they decided that case?

MR. PRITZKER: No, your Honor.

THE COURT: They haven't?

MR. PRITZKER: It was set for expedited appeal. The check is in the mail.

THE COURT: And you know, that one has one of the best Judges in the country I know of and that is Judge Henley and I was waiting to see what Judge Henley said [7] about that ordinance in Eager, Minnesota.

MR. PRITZKER: Judge Henley was disturbed because several of his pipes were paraphernalia under the ordinance.

MR. WILLIAMS: Your Honor, for the record, before we leave, I want to point out the last question asked by Mr. Pritzker after the corncob pipe we discussed, it was a marketing aspect and certainly the way they market it is different than the way Osco markets it.

THE COURT: In view of what you have said, Mr. Williams, I will look at the memorandum. It has been sent to West Publishing Company. I will correct it. I will see this motion will be granted only to the extent of amending the memorandum of the Court to make it accurate as to the number of the items that were taken from the shelves of the plaintiff by the agents as described in the memorandum. Only to that extent is the motion granted, otherwise it is denied.

MR. WILLIAMS: Thank you, your Honor.

MR. PRITZKER: Thank you.

(Which were all the proceedings had in said cause on said date.)

Filed April 17, 1980
H. Stuart Cunningham, Clerk
United States District Court

[1] IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
Plaintiff,

vs.

VILLAGE OF HOFFMAN ESTATES,
Defendant.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. GEORGE N. LEIGHTON, one of the Judges of said Court in his courtroom in the United States Courthouse at Chicago, Illinois on Friday, Feb. 29, 1980 at 9:30 a.m.

PRESENT:

MR. MICHAEL L. PRITZKER
(Stroup, Goldstein, Jacobs, Jenkins, Pritzker & Ware)
134 North La Salle, Room 2100
Chicago, Illinois 60602

on behalf of the plaintiff.

[2] THE CLERK: 78 C 2114, *The Flipside, Hoffman Estates,* vs. *Village of Hoffman Estates.*

MR. PRITZKER: Good morning, your Honor. For the record, my name is Michael Pritzker on behalf of the plaintiff.

THE COURT: Yes.

MR. PRITZKER: Your Honor, we filed a petition.

THE COURT: Yes, Mr. Pritzker, I read what you have filed. I was wondering what was the position of the defendant on this matter. Do you know?

MR. PRITZKER: Your Honor, I talked to Mr. Williams and advised him that the Court in its ordinary course of motion call would hear the case this morning. He advised me that he was detained in another matter and requested that, if possible, the Court either consider it this afternoon or put it over for another day.

THE COURT: I won't be able to consider it. I will put it over to some other time. I just have to hear from Mr. Williams whether the request is going to be made for an opportunity to file a response or answer or if he wants it heard orally. I didn't know.

MR. PRITZKER: Frankly, your Honor, I don't know either. He was to have called your office to determine what your Honor required of him.

THE COURT: No, no, the motion is being filed.

MR. PRITZKER: Yes, sir.

[3] THE COURT: I think it's necessary sometimes to see if I can hear from counsel so I can tell whether I should set further briefing or look at it and listen to you and see what it is.

This sounds to me like the kind of documents I used to read when I was in the Illinois Appellate Court. Isn't that what this amounts to, a petition for rehearing?

MR. PRITZKER: Yes, your Honor.

THE COURT: And you are calling my attention to the various phases of the case. You say I either misunderstood or misconstrued it or something, isn't that what it amounts to?

MR. PRITZKER: Not quite, your Honor. I think a part of it was through no fault of the Court or counsel. As you are

aware, in addition to the evidence being tampered with, a list of the sources of the evidence was, obviously, misplaced and the Court construed Exhibit 1 through 85 upon which it premised some of the reasoning of the Court and went under an assumption that was inaccurate, and it was certainly through no fault of counsel that the Court was misled that items 1 through 85 were all sold at plaintiff's store.

THE COURT: I see.

MR. PRITZKER: And the logic that flows from that distinction, we think that makes a significant difference.

THE COURT: Well, I will hear you. After all, you know how this case was handled. I started to hear the evidence, and then you gentlemen agreed to submit the rest of it on an agreed statement. Isn't that what it amounted to?

[4] MR. PRITZKER: Yes.

THE COURT: And then you took all the exhibits and put them in two big boxes, and you left them in the Clerk's office.

MR. PRITZKER: Under a protective order, sir.

THE COURT: Well, you know you might be interested in knowing Mr. Pritzker, that I understand from Judge Parsons that the FBI has been called into the matter to look and see who it was that pilfered into those two boxes and as soon as I found out, I called your office and had an inventory made.

There's no question about it. Somebody has taken some of those items out of there.

MR. PRITZKER: My only concern about those items, your Honor, was as a result of their absence at the point the Court asked for an examination of the evidence, there were things missing, including the list of evidence, and as a result, I think that inadvertently, I missed some things.

THE COURT: When does Mr. Williams want this continued to?

MR. PRITZKER: I would imagine he would be available next Friday, your Honor.

THE COURT: Continue this to the motion call next Friday and ask Mr. Williams so we will know. Then if we have to have a further hearing date, I will set it.

MR. PRITZKER: Yes, sir.

THE COURT: All right.

MR. PRITZKER: Thank you.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation, *Plaintiff,* *vs.* VILLAGE OF HOFFMAN ESTATES, Illinois, a Municipal Corporation, et al., *Defendants.*	No. 78 C 2114 — Before the Honorable **George N. Leighton,** United States District Judge

JUDGMENT

Judgment Entry in accordance with Rule 58(1) having been entered in favor of defendant, each of them and against the Plaintiff on February 11, 1980, this Court upon considering a Petition for Rehearing or Amendment of Judgment filed on February 25, 1980, and denying said Petition on March 14, 1980, except for a minor correction orders as follows:

It is hereby ordered that Judgment be ordered in favor of defendant, each of them and against the Plaintiff.

Dated at Chicago, Illinois, this 4th day of April, 1980.

Enter: _____

Judge George N. Leighton,
United States District Judge

UNITED STATES DISTRICT COURT,

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 78 C 2114 Date April 4, 1980

Title of Cause

The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates

Brief Statement of Motion

Order of the court correcting the last paragraph of part II, A on page 15 of this court's Memorandum so that the phrase "a total of 85" will read "a total of 72."

Plaintiff's Petition for Rehearing or Amendment of Judgment filed February 25, 1980 is granted only to the extent of correcting part II, A on page 15 of the court's Memorandum of February 11, 1980 so that the phrase "a total of 85" will read "a total of 72." In all other respects, plaintiff's Petition for Rehearing or Amendment of Judgment is denied.

Docketed April 7, 1980

/s/ Leighton, J.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

* * (Caption—No. 78 C 2114) * *

NOTICE OF APPEAL
(Filed April 7, 1980)

NOTICE is hereby given that THE FLIP SIDE, HOFFMAN ESTATES, INC., Plaintiff in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on April 4, 1980.

Michael L. Pritzker
By: /s/ R. Brent Daniel
STROUP, GOLDSTEIN, JENKINS & PRITZKER
Attorneys for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

NOTATION OF ITEMS TO BE FOUND IN THE JURISDICTIONAL STATEMENT

The Appendix of the Jurisdictional Statement contains the following items:

Opinion of the Seventh Circuit Court of Appeals	1a
Opinion of the District Court	28a
Denial of Petition for Rehearing by the Seventh Circuit Court of Appeals	46a
Notice of Appeal	47a
Ordinance 969-1978	48a

Office-Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1681

In the
Supreme Court of the United States
October Term, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, et al.,
Appellants.

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation,
Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit.

APPENDIX OF UNREPORTED DECISIONS

Michael L. Pritzker
R. Brent Daniel
Mark F. Sullivan
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TABLE OF CONTENTS

PAGE

Eucalyptus Records and Tapes Northwest, Inc., et al. v. James, et al., No. C-81-402-RJM (E.D. Wash. July 21, 1981) 1a

General Stores, Inc. v. City of Albuquerque, No. 81-0027-M (D.N.M. March 23, 1981) 5a

Hejira Corp., et al. v MacFarlane, et al., No. 80-2062 (10th Cir. May 5, 1981) 13a

Indiana Chapter (NORML) et al. v. Sendak, et al., No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) 37a

Lazy J., Ltd., et al. v. The Borough at State College, No. 80-1167 (M.D. Pa. Jan. 30, 1981) 65a

Smith, et al. v. Roark, et al., No. 80-2110 (S.D. W. Va., May 13, 1980) 77a

The Town Tobacconist, et al. v. Degnan, No. C-2198-80 Super. Ct. N.J., March 12, 1981) 93a

Wakabayashi v. Tooley, No. 81 CU 6293 (Dist. Ct., City and Co. of Denver, Co. decided August 18, 1981) 103a

APPENDIX

UNITED STATES DISTRICT COURT

Eastern District Of Washington

EUCALYPTUS RECORDS AND TAPES NORTHWEST, INC., et al.

Plaintiffs,

v.

CHARLES R. JAMES, et al.

Defendants.

No. C-81-402-RJM

Filed in U.S. District Court,
Eastern District of Washington
Jul. 21, 1981
J. R. Fall Quist, Clerk

ORDER

Plaintiffs have moved for a preliminary injunction prohibiting the enforcement of the provisions contained in Washington Laws of 1981, Chapter 48, to be codified at Chapter 69.50 of the Revised Code of Washington. I have concluded that the motion should be granted.

The law in question makes it a crime to use, or to knowingly deliver, or possess or manufacture with the intent to deliver, drug paraphernalia. The statute also contains a criminal penalty for the placing of advertisements promoting drug paraphernalia and civil forfeiture provisions. The language of the Washington statute was taken almost verbatim from the Model Drug Paraphernalia Act drafted by the Drug Enforcement Agency in 1979. Plaintiffs have challenged the statute on several constitutional grounds.

The test to be applied in determining whether a preliminary injunction should issue has been stated by the Ninth Circuit as follows:

> One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

Wm. Inglis & Sons Baking Co. v. *ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975).

Turning first to the matter of irreparable harm, I find that plaintiffs have made a strong showing of hardship should the statute be implemented prior to a final judicial determination of its validity. First, as evidenced by the affidavits submtited by plaintiffs, they face substantial business losses if they refrain from selling arguably proscribed items during the pendency of this case. Alternatively, if plaintiffs continue to do business pending a decision on the merits, they face the threat of criminal prosecution under a potentially invalid statute.

Further, the portion of the statute which prohibits the advertisement of the items proscribed has been alleged by plaintiffs to violate the First Amendment. As the Supreme Court has stated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). Finally, defendants have not made a specified showing of what harm would result from a delay in enforcing the statute. The Court also notes in this regard the fact that the legislature opted not to enact the law as an emergency bill.

Given the existence of the serious potential hardship weighted toward plaintiffs, an injunction may be granted upon the minimal showing that "a serious question" exists as to the outcome on the merits. I find that plaintiffs have met this requirement. There have been numerous recent judicial decisions on the validity of various ordinances and statutes resembling the Model Drug Paraphernalia Act. It is not necessary to explore these various decisions at length; suffice it to say that in several of these decisions the courts have invalidated these

laws. *E.g., Record Revolution No. 6, Inc.* v. *City of Parma*, 638 F.2d 916 (6th Cir. 1980); *Weiler* v. *Carpenter*, 507 F. Supp. 837 (D.N.M. 1981); *Information Management Services, Inc.* v. *Borough of Pleasant Hills*, 512 F. Supp. 1066 (W.D. Pa. 1981); *General Stores, Inc.* v. *City of Albuquerque*, No. 81-0027-M Civil (D.N.M. March 23, 1981).

Under these circumstances, a preliminary injunction is justified. *See Florida Businessmen for Free Enterprise* v. *City of Hollywood*, No. 80-5769 (5th Cir. June 10, 1981). Accordingly,

IT IS ORDERED that defendants and their employees and agents are enjoined from enforcing the provisions of Washington Laws of 1981, Chapter 48, by arrest, prosecution, or seizure, pending further order of this Court.

At the hearing on plaintiff's motion, counsel for the State requested permission to further brief the questions relating to the Court's authority to delete objectionable portions of the statute. The parties should contact the Clerk of the Court within ten (10) days of the receipt of this Order and indicate whether a date should be set for either the filing of further briefs or the holding of an evidentiary hearing, or whether the matter will be submitted on the existing record. In making these decisions, counsel should consider whether the present record is adequate for purposes of appeal.

DONE THIS 21st DAY OF JULY, 1981.

/s/ Robert J. McNichols

Robert J. McNichols
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

For The District Of New Mexico

GENERAL STORES, INC., a New Mexico corporation, and MITCHELL FELDMAN,

Plaintiffs,

v.

CITY OF ALBUQUERQUE, a municipal corporation, and ELROY HANSEN,

Defendants.

No. 81-0027-M Civil

Filed at Albuquerque
Mar. 23, 1981
Jesse Casaus, Clerk

MEMORANDUM OPINION AND ORDER

This case is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. §1983. The plaintiffs are General Stores, Inc., a New Mexico corporation and its owner Mitchell Feldman. The defendants are the City of Albuquerque, a municipal corporation, and Elroy Hansen who is the Albuquerque Chief of Police. Plaintiffs have challenged the constitutionality of the Albuquerque Drug Paraphernalia Ordinance which went into effect in January 1981. Enforcement of the ordinance has been stayed pending my decision in this matter due to several stipulations entered into by the parties. Although such a stay exists, a case or controversy is present because there is a genuine threat of criminal prosecution of the plaintiffs under the ordinance that is being challenged. *Steffel* v. *Thompson,* 415 U.S. 452 (1974). Jurisdiction of this court is, therefore, proper pursuant to 28 U.S.C. §§1321, 1343, 2201 and 2202.

A hearing on plaintiffs' application for a preliminary injunction was held in this matter on March 6, 1981. Since that time, the parties have agreed that the trial on the merits is to be consolidated with that hearing pursuant to Rule 65 of the Federal Rules of Civil Procedure. The pleadings filed, the testimony taken at the hearing on the plaintiffs' application for a preliminary injunction, the exhibits admitted into evidence on that date and the memoranda of points and authorities submitted by the parties constitute the entire record before this Court.

Plaintiffs challenge the constitutionality of the ordinance by alleging that it is vague and overbroad and, therefore, a deprivation of the guarantee of due process found in the Fourteenth Amendment to the United States Constitution. They also allege that because the ordinance is aimed at a certain class of retailers, it violates the equal protection guarantees found in the United States Constitution. Plaintiffs further allege that the ordinance violates First Amendment rights and unlawfully interferes with interstate commerce in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States. Plaintiffs have requested this Court to enjoin the defendants from enforcing the ordinance, to declare the ordinance violative of the First Amendment, Fourteenth Amendment, and the Commerce Clause of the United States Constitution, and to award the plaintiffs their reasonably incurred attorneys' fees pursuant to 42 U.S.C. §1988.

The ordinance being challenged in this action is an alteration of the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration of the United States Department of Justice. Other courts have found various provisions of the Model Act unconstitutional. *See e.g. Record Revolution No. 6, Inc.* v. *City of Parma*, ... F.2d ....., (6th Cir. 1980); *Weiler* v. *Carpenter*, No. 80-637-JB Civ., (D.N.M. Feb. 11, 1981). In response to these decisions, the Albuquerque City Council omitted some sections of the Model Act and revised other sec-

tions. These amendments illustrate a commendable attempt by the Albuquerque City Council to pass a constitutional ordinance. These attempts, however, are not sufficient to render the ordinance constitutional.

Plaintiffs initially argue that the ordinance is unconstitutionally vague, contrary to the Due Process Clause of the Fourteenth Amendment.

An ordinance is void for vagueness if its prohibitions are not clearly defined.

> Vague laws often offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) (footnotes omitted). The Albuquerque Drug Paraphernalia Ordinance, which is set out at the end of this opinion, offends both values. It fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and it fails to provide explicit standards for those who must enforce the ordinance.

Although I believe the ordinance is vague in its entirety, I set out below several specific illustrations of its vagueness. By doing so, I do not mean to imply that the examples given are the only constitutional problems of the ordinance. I agree with many of the findings and conclusions of other courts with respect to various portions of the Model Act.

One section of the ordinance attempts to define drug paraphernalia and states that drug paraphernalia means, "all equipment, products and materials of any kind which are used, intended for use, or designed for use," in doing a variety of things with controlled substances. The ordinance fails to set out whose intent or whose use or whose design is applicable to this definition. The plaintiffs here are sellers of items which may fall under the definition of drug paraphernalia. They are concerned that they may be charged with a crime because of a purchaser's intent to use an item for illegal uses. In the cases involving challenges to similar ordinances by sellers of items which may be drug paraphernalia, the courts do not agree whether the intent of the seller or the intent of the purchaser is the relevant intent when the seller is the one charged with a drug paraphernalia crime. *Compare e.g. Weiler* v. *Carpenter*, No. 80-637-JB Civ. at 8 *with Florida Businessmen for Free Enterprise* v. *City of Hollywood*, No. 80-6157 Civ.-NCR (S.D. Fla. Aug. 29, 1980). I find that no matter whose intent is relevant, the statute is unconstitutionally vague. If it is the buyer's intent that is relevant, then the seller who is charged with a crime is charged with the knowledge of what a buyer's intent is. That does not give him a reasonable opportunity to know what the ordinance prohibits. If it is the seller's intent which is relevant then the policeman attempting to enforce the ordinance will have to divine the seller's intent. The ordinance, however, fails to provide explicit standards for the policeman to apply in divining the seller's intent.

Another portion of the ordinance attempts to define "designed for use". It states that that term shall mean "designed, made or modified with the specific intent that the item so designed, made or modified is to be used" in a variety of activities involving controlled substances. Once again, it is unclear whose intent is relevant in this definition. If it is the designer's intent that is relevant, then a storekeeper or a purchaser could be guilty of a violation of a drug paraphernalia law even though they

did not intend to use it or have it be used with drugs. He is saddled with an impossible task—knowing the designer's intent. Many of the items listed as possible items of drug paraphernalia are things used by people in ways not involving controlled substances and a storekeeper does not know the intent of all the designers of his merchandise. He, therefore, is unable to determine what he is allowed to deliver to his customers.

Another portion of the ordinance sets out relevant factors to be used in "determining whether an object is drug paraphernalia (by) a court or other authority." Although these factors are listed as relevant, no guide is given to a person reading the ordinance to determine the amount of importance each factor possesses. It is unclear how many of the relevant factors must be present, before an item will be considered drug paraphernalia. One factor is whether the owner is a legitimate supplier of like or related items in the community such as a licensed distributor or dealer of tobacco products. I have no idea what a legitimate supplier is, much less how this factor affects the other factors. Another factor listed is the "ratio of sales of the object(s) to the total sales of the business enterprise." No guideline is offered as to what kind of ratio is indicative of drug paraphernalia and what ratio would be indicative of non-drug paraphernalia.

The foregoing examples of the vagueness of the ordinance make it clear that a person of ordinary intelligence is not given a reasonable opportunity to know what is prohibited, so that he may act accordingly. Furthermore, the interplay of these various sections, impermissibly delegates basic policy matters to the police and the courts for determination of what constitutes drug paraphernalia. This could easily lead to the dangers of arbitrary and discriminatory application. For these reasons, I find the ordinance unconstitutionally vague.

The ordinance also suffers from the infirmity of overbreadth. The overbreadth doctrine prohibits a statute

from making innocent or constitutionally protected conduct criminal. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). In the violation section of the ordinance it states that it is unlawful "for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to" do various things with controlled substances. The ordinance also makes it a violation for

> any person to place in any newspaper, magazine, handbill or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

Even if one could determine what items were drug paraphernalia, the fact that the standard "reasonably should know" is used in defining the violation seems to make negligence the basis for a criminal charge. At the very least, the inclusion of that standard renders the provision vague. It seems that one may be charged and convicted of the crime without having had the specific intent to commit the crime.

A second overbreadth problem in the relevant factors is the potential arrest, prosecution, or conviction of a person on the impermissible theory of guilt by association. Statements by another, proximity of the object, in time and space, to a direct violation of drug laws are included as relevant factors. This means that the ordinance permits events beyond the control of the retail owner to determine his guilt. This may well make a person's innocent conduct subject to criminal prosecution. This is clearly overbreadth and, therefore unconstitutional.

The defendants have argued that if the Court found the ordinance to be ambiguous then abstention would be proper so that the state courts could have an oppor-

tunity to construe the ordinance in a constitutional manner. *Bellotti* v. *Baird*, 428 U.S. 132 (1976). I find that argument to be inapplicable to the present situation. The ordinance does not suffer from mere ambiguity; it suffers from total vagueness and overbreadth. Giving an opportunity to the state courts to construe the statute would be useless. It cannot be construed in a constitutional manner.

The plaintiffs have also claimed that the ordinance deprives them of the equal protection of the laws and that it is aimed specifically at plaintiffs and other similarly situated retailers but not at retailers whose places of business sell "paraphernalia" as small or incidental portions of the inventory. Because of my ruling on the due process claim of the plaintiffs, I shall decline to decide whether or not the equal protection guarantees of the plaintiffs have been violated. I do note, though, that that portion of the ordinance brought into question by plaintiff in their equal protection claim is clearly a factor of my finding a violation of due process guarantees as discussed above.

Plaintiffs have also challenged the ordinance on the basis that their First Amendment freedom of speech rights have been violated by enactment of the ordinance. This argument focuses on the violation section regarding advertisement. The amendments to the Model Act which were made by the Albuquerque City Council seem to have cured at least some of the First Amendment infirmities found by other courts with the original version of the Model Act. Because of the ordinance's unconstitutionality on other grounds, I will decline to make a determination as to whether or not it violates the First Amendment rights of the plaintiffs.

The plaintiffs' complaint also contained an allegation that the ordinance was in violation of the Commerce Clause of the United States Constitution. They have failed to address that issue in their various memoranda and arguments. They, therefore, have failed to sustain

their burden of proof on this issue and I shall find for defendant on this issue.

Plaintiffs have also requested that I award them their reasonably incurred attorneys' fees pursuant to 42 U.S.C. §1988. I find that they are a prevailing party and that such an award would be proper. *Gurule* v. *Wilson*, 635 F.2d 782 (10th Cir. 1980). Plaintiffs shall have ten days to submit their requested amount of attorneys' fees and defendants shall have five days from that submission to make any objections. Now, Therefore,

IT IS ORDERED that defendants be, and hereby are, enjoined from enforcing enactment of 2-1981 entitled "Ordinance Prohibiting the Manufacture and Delivery of Drug Paraphernalia; Prohibiting the Advertisement of Drug Paraphernalia; Establishing a Penalty for Violation; Amending the Criminal Code of the City of Albuquerque."

IT IS FURTHER ORDERED that a Declaratory Judgment shall be, and hereby is, entered that the ordinance described above is in violation of the Fourteenth Amendment to the United States Constitution, and is, therefore, declared unconstitutional.

IT IS FURTHER ORDERED that plaintiffs shall be awarded their reasonably incurred attorneys' fees in an amount to be determined at a later date.

IT IS FURTHER ORDERED that plaintiffs' claim pursuant to the Commerce Clause of the United States Constitution be, and hereby is, dismissed on the merits.

/s/ Edwin Mechum
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 80-2062

HEJIRA CORPORATION, et al.,

Plaintiffs-Appellees,

v.

J. D. MAC FARLANE, et al.,

Defendants-Appellants.

Appeal from the United States District Court
For the District of Colorado
(D. C. No. 80-F-824)

David K. Rees, Assistant Attorney General, Denver, Colorado (J. D. MacFarlane, Attorney General, Richard F. Hennessey, Deputy Attorney General, Mary J. Mullarkey, Solicitor General, J. Stephen Phillips, First Assistant Attorney General, Denver, Colorado, with him on the brief), for Defendants-Appellants.

Arthur M. Schwartz, Arthur M. Schwartz, P.C., Denver, Colorado (Bradley J. Reich, Arthur M. Schwartz, P.C., Denver, Colorado, with him on the brief), for Plaintiffs-Appellees.

Before SETH, MCWILLIAMS and DOYLE, *Circuit Judges.*

DOYLE, *Circuit Judge.*

This declaratory action was instituted by a number of dealers in drug paraphernalia. They sought a judgment declaring the Colorado Drug Paraphernalia Act invalid — in violation of the Constitution of the United States.

House Bill No. 1190 became law on or about July 1, 1980. Five days before this date (when House Bill No. 1190 was to become effective) the plaintiffs, all of whom are dealers in drug paraphernalia, brought suit in the

United States District Court for the District of Colorado, naming as defendants the Attorney General of the State of Colorado and certain district attorneys, sheriffs and police chiefs. The plaintiffs sought declaratory relief which would declare House Bill No. 1190 unconstitutional, and sought, in addition, injunctive relief which would restrain the enforcement of the Colorado Drug Paraphernalia Act.

On September 5, 1980, the trial court held that the definition of "drug paraphernalia," which was contained in the Act, was unconstitutionally vague, and based upon that conclusion the court granted the plaintiffs' request for injunctive relief. The court rejected the plaintiffs' other constitutional attacks. The defendants filed their notice of appeal within the time allowed under the law.

It is impossible to determine the validity of the Colorado Drug Paraphernalia Act by reference to any particular provision thereof, or anything less than the total Act. Hence, the text of this Act is appended to this opinion. Because various sections will be considered we shall describe these provisions.

The legislative provision which is contained in Section 12-22-501 finds and declares that the possession, sale, manufacture, delivery or advertisement of drug paraphernalia results in the legitimization and encouragement of the illegal use of controlled substances by making the drug culture more visible and enticing, and that the ready availability of drug paraphernalia tends to promote, suggest, or increase the public acceptability of the illegal use of controlled substances. It is further stated that the purposes of part 5 of the Act are to promote the public peace, health, safety and welfare by prohibiting possession, sale, manufacture, and delivery or advertisement of drug paraphernalia, and to deter the use of controlled substances by controlling the drug paraphernalia associated with their use.

Section 502 of the Act defines a controlled substance as being a narcotic drug, the same as defined in Section

301, or dangerous drug, as defined in Section 403, and also defines drug paraphernalia as any machine, instrument, tool, equipment or device which is primarily adapted, designed and intended for one or more of the following: to introduce into the human body any controlled substance under circumstances in violation of the laws of this state; to enhance the effect on the human body of any controlled substance under circumstances in violation of the laws of this state; to conceal any quantity of any controlled substance under circumstances in violation of the laws of this state; to test the strength, effectiveness or purity of any controlled substance under circumstances in violation of the laws of this state. The section sets forth eleven factors which the court may consider, in addition to other relevant factors, in determining whether an object is drug paraphernalia. Included are:

(1) statements by an owner or by anyone in control of the object concerning its use;

(2) the proximity of the object to controlled substances;

(3) existence of any residue of any controlled substances on the object;

(4) direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows intend to use the object to facilitate a violation of part 5.

(5) instructions, oral or written, provided with the object concerning its use;

(6) descriptive materials accompanying the object which explain or depict its use;

(7) national or local advertising concerning its use;

(8) the manner in which the object is displayed for sale;

(9) whether the owner or anyone in control of the object is a supplier of like or related items in

the community for legal purposes, such as the distributor or dealer of tobacco products;

(10) existence and scope of legal uses for the object in the community;

(11) expert testimony concerning its use.

Finally, that section directs that in the event a case is brought pursuant to part 5 and is tried before a jury, the court shall hold an evidentiary hearing on issues raised pursuant to this section, such hearings to be conducted *in camera.*

Section 504 describes how one commits a violation of the statutory mandate of anti-possession of drug paraphernaila: One violates this section if he possesses drug paraphernalia and intends to use it under circumstances in violation of the laws of this state.

Section 505 proscribes the manufacture, sale or delivery of drug paraphernalia, and states that any person who sells or delivers, possesses with intent to sell or deliver, or manufactures with intent to sell or deliver, equipment, products or materials intending that such equipment, products or materials will be used as drug paraphernalia, commits a class 2 misdemeanor, and is subject to punishment as provided in Section 18-1-106.

Section 506 sets forth the penalty for advertisement of drug paraphernalia. This section provides that one who places an advertisement in a newspaper, magazine, handbill or other publication, and who (in doing so) intends to promote the sale in this state of equipment, products or materials designed and intended for use as drug paraphernalia commits a class 2 misdemeanor, and becomes subject to punishment as provided in Section 18-1-106.

To summarize:

Section 501 of the Act covers the legislative declaration concerning control of drug paraphernalia;

Section 502 defines drug paraphernalia;

Section 503 lists eleven factors which the court may consider in determining whether an object is drug paraphernalia;

Section 504 makes it an offense to possess drug paraphernalia with the intention to use it in violation of the laws of this state;

Section 505 makes it an offense to manufacture, sell or deliver drug paraphernalia with the intent that the items be used as drug paraphernalia; and,

Section 506 proscribes advertisement of items designed and intended for use as drug paraphernalia.

The trial court ruled, first of all, that the plaintiffs herein, merchants for the most part, did not have standing to represent the users or purchasers of the items here in question. The court also ruled, however, that the statute is unconstitutionally vague in at least two respects. The standard "primarily adapted, designed and intended" was held not to be an adequate one. The court also concluded that the eleven standards set forth for use by the court did not provide either notice to possible violators, nor to police officers and other enforcement officers, what factors were to be considered in ascertaining whether there had been a violation of the statute.

Generally, these are the points which this court must consider in a determination of whether the trial court erred in its conclusions.

The points advanced by the Attorney General are set forth in a summary of the argument, which in effect declares:

The Colorado Drug Paraphernalia statute is not vague.

It provides defendants with fair warning of forbidden conduct and contains sufficient standards to guard against arbitrary or discriminatory enforce-

ment. Moreover, as all the crimes defined in the statute contain specific intent as an element, the statute cannot be termed vague.

I.

Do the plaintiffs have standing?

The trial court's ruling was that while the plaintiffs have standing, that is, a stake in the outcome sufficient to challenge the Act in their capacities as potential sellers and advertisers of drug paraphernalia, they lacked standing to assert the rights of third parties, that is, the rights of purchasers or possessors of drug paraphernalia. It is true that plaintiffs lack standing to raise issues which are the private rights of potential purchasers and possessors of drug paraphernalia, and which deal with conditions and situations not properly before the court, such as whether the Act may violate the privacy of potential possessors of drug paraphernalia. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973). It is not to be denied, however, that the plaintiffs may raise the rights of potential purchasers and possessors of drug paraphernalia insofar as those rights are interrelated with the rights of the plaintiffs, and thus involve questions which are properly before the court. Plaintiffs have standing to dispute the constitutionality of the entire Colorado Drug Paraphernalia Act when attacking the validity of the Act on its face.

The case of Craig v. Boren, 429 U.S. 190 (1976), rehearing denied 429 U.S. 1124 (1977), is about as similar as a precedent could be. In *Craig* the question to be decided involved the constitutionality of an Oklahoma statute which prohibited the sale of 3.2 beer to males under 21 years of age, but which permitted sales to females between the ages of 18 and 21. In *Craig* a vendor of the beer was allowed to assert the equal protection claim of males between the ages of 18 and 21, since the statute created legal duties "addressed directly to" such vendors, and the constitutional rights of males be-

tween the ages of 18 and 21 would be "diluted or adversely effected" if the vendor's claim were to fail. *Id.* at 194-195. The Supreme Court pointed out that the vendor was in a position in which it had to heed the statutory discrimination and thus incur a direct economic injury through the constriction on its buyers market, or disobey the statutory command and suffer the sanctions. So, therefore, the vendor had a strong interest in asserting the position that it took in court. Similarly, in the instant case, the Colorado Drug Paraphernalia Act creates duties addressed directly to vendors of drug paraphernalia. By selling paraphernalia to purchasers, vendors violate the Act. Therefore, under the *Craig* rationale, plaintiffs should be allowed to assert the due process claims of prospective purchasers and possessors of drug paraphernalia, since, if plaintiffs' claims were to fail, the rights of prospective purchasers of drug paraphernalia would be diluted or adversely affected. Hence, the interests of potential purchasers and potential sellers in this statute are directly interrelated.

We agree, as well, with the finding of the district court that the federal court has jurisdiction over this case. No criminal prosecution, it is true, has commenced as a result of the enforcement of the Act. Nevertheless, the court record clearly shows that plaintiffs face real and genuine threats of prosecution under the Act so as to show the existence of an Article III case or controversy. Steffel v. Thompson, 415 U.S. 452 (1974). Accordingly, this court has jurisdiction to consider the facial validity of the Colorado Drug Paraphernalia Act.

One other matter: There is no necessity for abstaining or temporarily dislodging the case and referring it to the state court, because it is not likely that the state court's consideration of the case would either render it unnecessary for federal consideration or substantially modify essential federal constitutional questions. *See*, for example, Record Revolution No. 6, Inc. v. The City of Parma, et al, Nos. 80-3308, 80-3352, 80-3353, 6th Cir.

Dec. 8, 1980, Slip Op. at pages 15-17; High Ol' Times, Inc. v. George Busby, 621 F.2d 135 (5th Cir. 1980). We hold, therefore, that this court has jurisdiction to presently consider the merits of the complaint.

The Purpose of the Act

At the outset, we recognize that the subject matter and object of this statute is to aid in curtailing drug use by prohibiting the sale, possession and advertisement of devices which tend to facilitate, enhance, condone, and render acceptable the use of illegal drugs.

The Drug Enforcement Administration of the United States Department of Justice has drafted the Model Drug Paraphernalia Act, and this apparently has been the model for use by the several states in enacting similar statutes. The Model Act declares:

> The availability of drug paraphernalia has reached epidemic levels. An entire industry has developed which promotes, even glamorizes, the illegal use of drugs by adults and children alike. Sales of drug paraphernalia are reported as high as three billion dollars a year.

In drafting this Act the Department of Justice had the above described problem in mind. Surely the object is laudable, and unquestionably the Colorado General Assembly has the power and authority to enact a statute of this character. *See* Geiger v. City of Eagan, 618 F.2d 2 (8th Cir. 1980). This fact was acknowledged in the district court's opinion, where the court stated:

> The enactment of drug laws are certainly within the police power of the state. * * * [Such laws] go directly to the health, welfare and the public concern for the inhabitants of the State of Colorado. In the General Assembly's exercise of its police power to protect the public health, safety, morals and welfare, the purposes of the Act in question are both constitutionally and logically sound. * * * [T]here is a

nexus between the abuse of controlled substances and the glorification of devices which facilitate such abuse. • • • The is a rational relationship between these laws and a legitimate government purpose.

Specifics of the Trial Court's Ruling

The district court struck down the legislation because it found that the Act was vague on its face for two reasons: *First,* because it found the phrase "primarily adapted, designed and intended" insufficient to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited; *second,* because it found that the Act fails to provide explicit standards for those charged with enforcement of the law. The court noted that the words "primarily adapted, designed and intended" had to be considered conjunctively; that the words could not be applied disjunctively. The court noted that while the items may be primarily adapted or designed or intended for the use of illegal drugs, they could not be primarily adapted and designed and intended for such purposes.

The trial court further concluded that while the Act includes eleven enumerated factors to aid in determining whether an object constitutes drug paraphernalia, the legislature failed to state that these examples or guidelines were for law enforcement officials to follow, and thereby, they have allowed the police too much administrative discretion in the enforcement of a penal statute. The court noted that the Model Act provides that the guidelines should be considered by a court *or other authority*; whereas the Colorado General Assembly has provided that the guidelines were for the use of the court, but has not said that they were available for use by the police or other enforcement authorities. The court indicated that if specific tests had been provided for *law enforcement authorities* to consider, said factors would have constituted guidance on the application of the Act and would have served to minimize the risk of arbitrary and discriminatory enforcement of the Act. *See,* Inter-

state Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968). The Judge's remarks are to be interpreted as meaning that if the General Assembly had mandated that the police, prosecutors or other authorities consider the eleven factors stated in Section 503, his conclusion would have been different.

II.

Is the definition of drug paraphernalia which is contained in House Bill No. 1190, which definition encompasses "any machine, instrument, tool, equipment or device which is primarily adapted, designed and intended" for one or more of four enumerated purposes, unconstitutionally vague and indefinite?

The trial court was unquestionably correct in its conclusion that the phrase "primarily adapted, designed and intended for use in one of the four enumerated purposes" had to be read in the conjunctive rather than the disjunctive. Therefore to constitute drug paraphernalia under that definition an item must be primarily adapted *and* designed *and* intended for use in one of the four enumerated manners or ways. This phrase in its entirety does not provide objective standards for determining what items fall within the definition of drug paraphernalia. One fault is that terms "adapted" and "designed" conflict with one another. In order to "adapt" an item for use in a particular manner, one has to make the item suitable or fit for a particular use or purpose, to make the item adjust to particular conditions or ways. *See* Third New International Dictionary, 1917 Edition. To *design*, on the other hand, means "to devise or propose for a specific function; to create, plan or calculate for serving a predetermined end." *Designed* is clear in its meaning, which is that the item is predetermined for a particular use. *Adapted* is in conflict with that definition because the word "adapted" means that something which has not been designed for a particular use has to be adapted or changed so that it can be so used. If these terms were given a very narrow meaning, it is possible

that they could be reconciled. However, the courts frown on constructing terms in a limited way and thus narrowing the statutory language. *See* Hynes v. Mayor and Council of the Borough of Oradell, 425 U.S. 610, 622 (1976); Smith v. Goguen, 415 U.S. 566 (1974); Gooding v. Wilson, 405 U.S. 518 (1972). The severing of one of the conflicting phrases is a different matter, however. If such action cures the problem and renders the statute constitutional on its face, severance can be carried out.

The Colorado statute on severability, CRS 2-4-204 (1973) provides as follows:

> *Severability of statutory provisions.* If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid, unless it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

This general severability clause applies to a legislative act which does not contain a specific severability provision. People v. Vinnola, 494 P.2d 826 (Colo. Sup. Ct. en banc, 1972).

The test is whether the void provision and the valid provision are essentially and inseparably connected and interdependent, one with the other, so that it cannot be presumed that the legislature would have enacted the valid provisions without the void one. Severance is impossible if the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932); Buckley v. Valeo, 424 U.S. 1, 108 (1976).

The wording of the statute passes the test in our judgment. The term "adapted" contributes virtually nothing; "designed" is the strong term. It is clear that in requiring that the product should have been designed for a particular purpose legislative intent will be upheld. "Adapted" serves no purpose either by itself or in conjunction with "designed." It can be removed without being missed, and such removal would not hinder the legislative intent of the statute.

Legislative intent is, of course, the final answer. Colorado Project-Common Cause v. Byron Anderson, et al, 495 P.2d 218 (Colo. Sup. Ct. en banc, 1972); Dorchy v. State of Kansas, 264 U.S. 286 (1924). Legislative intent is to be gleaned from the interpretation of the statute as a whole. R & F Enterprises, Inc. v. Board of County Commissioners, 606 P.2d 64 (Colo. Sup. Ct. en banc, 1980).

Must the portion which is ruled constitutionally invalid be a self contained sentence or a separate section or subsection? The answer is no. Jones v. Smith, 474 F.Supp. 1160, 1169 (S.D.Fla. 1979). Frequently courts have severed invalid sentences or clauses from a statute, rather than entire sections, in an effort to uphold the constitutionality of the Act in question. *See, e.g.,* Lipp v. Morris, 579 F.2d 834 (3rd Cir. 1978); Moore v. Fowinckle, 512 F.2d 629 (6th Cir. 1975); Planned Parenthood Ass'n. of Kansas City v. Ashcroft, 483 F.Supp. 679 (N.D. Mo., 1980). The Colorado Supreme Court has severed a sentence from a statutory section in Covell v. Douglas, 501 P.2d 1047 (Colo. Sup. Ct. en banc, 1972), *cert. denied,* 412 U.S. 952 (1973), and has severed words and phrases from a statute in Shroyer v. Sokol, 550 P.2d 309 (Colo. Sup. Ct. en banc, 1976). *See also,* Record Revolution No. 6, Inc., supra, where the Sixth Circuit stated that it could have severed the constitutionally invalid phrase in the definition of drug paraphernalia (as stated in the Act with which that court was concerned), and thereby upheld the constitutionality of the remainder of the Act, if the explicit terms of the Act

in question had not limited severability to the section describing the substantive offense. Slip Op. at p. 28. There is no such limiting instruction as to severability in the Colorado Drug Paraphernalia Act.

Accordingly, if severance of the word "adapted" renders the definition constitutional, this court is authorized to sever such a word whereby it would read "primarily designed and intended" rather than "primarily adapted, designed and intended."

The General Purpose

The general intent of the legislature in enacting this statute was to curb the use of illegal drugs by restricting the availability of drug paraphernalia. In our view this legislative intent is fostered and promoted and is not hindered by severing one of two conflicting terms which, when applied conjunctively, only serve to exclude items from falling within the definition of drug paraphernalia because of the difficulty, if not impossibility, of defining an item as both "designed" for use and "adapted" for use with illegal drugs. Since these terms are not so intertwined that the valid term could not stand alone, this court is authorized to sever one of the two conflicting terms. Logic dictates that the word "adapted" be selected, rather than the word "designed," since the same incompatibility which exists between the words "designed" and "adapted" may also exist between the words "intended" and "adapted."

Meaning of "Designed"

We must, then, answer a further question regarding whether the Act can be upheld if the definition set forth in the statute includes any machine, instrument, tool, equipment or device which is "primarily designed and intended" for one or more of the four enumerated purposes. In so doing, we must ask: what is meant by the term "designed?"

Since the definition of drug paraphernalia in the Model Act includes any equipment, products or materials used, intended for use, or designed for use with illegal drugs, and many of the innumerable drug paraphernalia acts which were enacted in the wake of the Model Act have incorporated the same definition within their respective statutes, the term "designed for use" has been frequently interpreted by the courts.

Those statutes which follow the Model Act, at least in a basic way, have been upheld by a number of district courts. Florida Businessmen for Free Enterprise v. City of Hollywood, No. 80-6157 Civ-NCR (S.D.Fla. Aug. 29, 1980); Delaware Accessories Trade Association v. Gebelein, 497 F.Supp. 289 (D.Del. 1980); World Imports, Inc. v. Woodbridge Township, 493 F.Supp. 428 (D.N.J., 1980); Nova Records v. Sendek; No. IP80-431-C (S.D. Ind., Dec. 9, 1980); Mid-Atlantic Accessories Trade Association v. State of Maryland, 500 F.Supp. 834 (D.Md., 1980). *See also,* the Eighth Circuit case of Geiger v. City of Eagen, supra, which indicated that it considered the Model Act to be a properly drawn statute. 618 F.2d at 28, n.4. The only *circuit* court which has specifically considered the constitutionality of an Act which followed somewhat strictly the Model Act has declared the Act unconstitutionally vague and overbroad on its face. Record Revolution No. 6, Inc. v. City of Parma, supra. In *Record Revolution* it was held by the Sixth Circuit that the drug paraphernalia act before it was unconstitutional because the term "designed for use" was vague and overbroad and the specific statutory section referring to severability precluded severance by limiting it to the section describing the substantive offense. The court quoted Indiana Chapter, Norml v. Sendek, No. TH-75-142-C (S.D.Ind., Feb. 4, 1980), in which the district court discussed the term "designed" in detail and stated:

> It is unclear what is meant by an instrument 'designed' for drug use. The term 'designed' could signify only devices that have no use or function other than as a means to ingest a controlled substance.

> Alternatviely, 'designed' could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term 'designed' could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition 'designed for drug use' gives no hint to those attempting to comply with [the ordinance] what is included in the definition.

The reason for the ruling in the Sixth Circuit in *Record Revolution* holding "designed for use" to be overbroad was because the term "drug paraphernalia" could constitute any device that could possibly be used with illegal drugs, and vague because of the "lack of any design characteristics that distinguished lawful purposes from unlawful purposes." Record Revolution, *supra* at Slip Op. p. 26. The Sixth Circuit stated that if drug paraphernalia was defined in terms of the design, "the definition begins to depend upon the ingenuity or purpose of the purchaser rather than the seller and upon the current practices of the clandestine society of drug users." There are other decisions which have arrived at this same conclusion as was reached in *Record Revolution.* These are Record Head Corp. v. Sachen, 498 F.Supp. 88 (E.D. Wis., 1980); Back Door Records v. City of Jacksonville, et al, No. LR-C-80 314 (E.D.Ark., Jan. 8, 1981); Robert Forrest Weiler v. Cleo Carpenter, et al, Civ. No. 80-637 JB (D.N.M., Feb. 11, 1981); Lazy J. Ltd. v. The Borough of State College, Civ. Action No. 80-1167 (M.D.Pa., Jan. 30, 1981).

Other courts have analyzed the term "designed for use" and have reached contrary conclusions. *See* Mid-Atlantic Accessories Trade Ass'n. v. State of Maryland, *supra*; Robert Brache and Edna Franza v. County of Westchester, et al, No. 80-Civ-4228-CSH (S.D.N.Y., Jan.

28, 1981).[1] *See also,* The Casbah, Inc. v. Charles Thone, Civ. No. 80-0-271 (D.Neb., Sept. 26, 1980). In *The Casbah* the court held that the term "designed for use" was not vague when read in the context of the entire statute; that the term "refers not to the physical characteristics of an object but to the subjective intent or plan of the person controlling the object." *See also,* Delaware Accessories Trade Ass'n. v. Gebelein, *supra*; Florida Businessmen for Free Enterprise v. City of Hollywood, *supra.*

The courts have addressed two concerns regarding this term, therefore: overbroadness and vagueness. We call attention to the fact that the word "primarily" before the word "designed" in the Colorado Act serves to restrict the term by requiring that an item must be *primarily* designed for use with illegal drugs in order to constitute paraphernalia. The Colorado legislature eliminated the concern expressed in *Record Revolution* that any item which may conceivably be used with illegal drugs may constitute drug paraphernalia. Therefore, this term, as used in the Colorado Act, is not overbroad. We now turn to the question of whether this term is unconstitutionalty vague.

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[1] The Brache Court stated as follows:

". . . common English usage supports the district court's observation in *Mid-Atlantic* that '[d]esign connotes an intentional act as well as an objective set of characteristics.' The prosecution may have some difficulty proving that a manufacturer intentionally 'designed' for drug use an item which could have others, but that is a different question. The element of scienter necessary to preserve a law from vagueness adds, by definition, another fact for the prosecution to establish by competent evidence. The drafters of the Model Act sought to eliminate vagueness and transferred intent by requiring the requisite elements of knowledge or intent on the part of manufacturer, seller or user, in order to bring a particular artifact within the definition of 'drug paraphernalia.' I see no basis for holding that they

Vagueness Analysis of the Phrase "Primarily Designed and Intended"

We must consider whether the definition of drug paraphernalia, encompassing as it does items "primarily designed and intended" for one of the enumerated uses, is unconstitutionally vague on its face. To do this we must consider what is meant by vagueness in the context of legislative enactments. Legislative acts involving criminal violations are held to be unconstitutionally vague if, first, they do not provide sufficient notice of the conduct which is proscribed, and, second, they do not provide law enforcement authorities with adequate standards for enforcement of the law. The United States Supreme Court has clearly expressed the constitutional dimensions of the standards to be followed when drafting legislation similar to that before us. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-9, 92 S.Ct 2294, 2298 (1972). The Supreme Court said that:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws often offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide

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[1] (Continued)

> succeeded in respect of the phrase 'intended for use,' but failed with 'designed for use.' *primarily* designed for use with illegal drugs in order to constitute paraphernalia. The Colorado legislature eliminated the concern expressed in *Record Revolution* that any item which may conceivably be used with illegal drugs may constitute drug paraphernalia." Slip Op. at p. 25.

> explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

The requirement that the words of a penal statute be clear and beyond speculation presents a question of real substance. All persons are entitled to be informed as to what the statute commands or forbids. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). It goes without saying that the standards of guilt must be sufficiently-ascertainable to prevent arbitary, erratic and discriminatory arrests and convictions. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). The legislature may not abdicate its policy making functions. It must establish the standards to be followed when enforcing the statute, and do so clearly. *See* Smith v. Goguen, 415 U.S. 566, 574 (1974).

Our first step when inquiring whether the definition of drug paraphernalia, as amended, is sufficiently precise, is to determine the meaning of the word "designed" contained in the phrase "primarily designed and intended." As previously seen, the problem addressed by the cases is *whose* intent the term "designed" refers to. Courts have construed that phrase as encompassing the subjective intent of the possessor or seller or the subjective intent of third persons, such as the purchaser of the item. The cases have considered the question of *who* "designed" the item for drug use, and the courts have concluded that the term must encompass a subjective intent on the part of the purchaser or seller in order for the definition to withstand constitutional attack. In *Record Revolution, supra,* therefore, the Sixth Circuit held that since the term "intended" for use referred to the intent of the possessor or seller as the person in control of the object, that phrase was not unconstitutionally vague. However, the Sixth Circuit, in that case, held that the term "designed" for use always referred

to the intent of the purchaser rather than to the intent of the one in control of the items, such as the seller when a sale was involved; as a result the Sixth Circuit held the definition of drug paraphernalia void for vagueness.

In order to uphold the validity of a drug paraphernalia statute, therefore, it has been required that the statute enunciate that the person prosecuted for violating the Act must have both intended the item in question to fall within the definition of drug paraphernalia, and intended to commit one of the substantive offenses listed in the Act. Such an analysis is troubling since it is to be remembered that there are two requirements necessary to establish guilt for violating the Colorado Drug Paraphernalia Act. First, the alleged violator must possess, sell or advertise drug paraphernalia; second, the possessor must intend to use the paraphernalia for illegal drug purposes, or the seller must intend for the buyer of the goods to use them for illegal drug purposes. It would seem, then, to be sufficient that the subjective intent, or mens rea, of the possessor or seller is found in the latter element of the offense. So analyzed, the prosecution would have to ask: Looking objectively, is this person possessing or selling drug paraphernalia? If that question is answered in the affirmative, then the next question would be: looking subjectively, does this person intend to use the paraphernalia for illegal drug purposes or intend for the purchaser to use the paraphernalia for such purposes? Following this reasoning, then, while the definition of drug paraphernalia must be sufficiently narrow to enable possessors and sellers to reach an objective conclusion as to what items are likely to fall within that definition, it would not be necessary that the definition require that the possessor or seller of the item shall have personally designed and intended that the item be used for illegal drug purposes. The intent of the possessor or seller is manifested in the second part of the offense. The possessor or seller may not be penalized for possessing or selling drug paraphernalia unless he

has the requisite intent to use it, or for others to use it, for illegal drug purposes. So analyzed, the issue would be whether the words "primarily designed and intended" provide an objective standard for determining whether an item reasonably falls within the definition of drug paraphernalia.

The courts have not tended to follow the latter analysis, however. There is concern that it is difficult to identify drug characteristics that distinguish lawful purposes from unlawful purposes; that the crimes defined in the Act are dependent upon the validity of the definition of drug paraphernalia, and that the intent requirement is found only in the second element of the offense and not the first. To avoid vagueness problems, therefore, the courts have generally required that the statutory definition of drug paraphernalia include a subjective intent on the part of the possesor or seller.

It is well to remember that the Model Act and the Colorado Act are different. In the Model Act the definition of drug paraphernalia is stated in the disjunctive. Thus, the definition of paraphernalia in the Model Act encompasses items "used, intended for use or designed for use for illegal purposes." An item may constitute drug paraphernalia if any one of the three standards is met; that is, if the item is used, intended for use, or designed for use with illegal drugs, it constitutes paraphernalia. The definition of drug paraphernalia in the Colorado Act, however, is stated in the conjunctive. Thus, an item may only constitute drug paraphernalia if it is intended for use and designed for use in one of the four enumerated ways. Regardless of whose intent the word "designed" refers to, the intent of the possessor or seller is still required by the words "*and* intended."

For the same reason that the intent requirement in the substantive offense sections of the Colorado Act refers to the intent of the possessor or seller, the intent requirement in the definition of drug paraphernalia

also refers to the intent of the possessor or seller. The United States Supreme Court favors an interpretation of legislation in a manner which supports its constitutionality. Screws v. United States, 325 U.S. 91; 65 S.Ct. 1031, 1033 (1945). When the word "intended" is specifically part of the statutory provision, that word is fairly susceptible of a construction which requires that the intent of the person who sells or possesses would be in violation of the statute. We regard this as the plain meaning of the word, and thus, a federal court reaching such a conclusion does not exceed its authority by construing the word in a narrow, limiting fashion. Due process requires such an interpretion of the word "intended." See Record Revolution v. City of Parma, *supra*, at pages 21-23.

Accordingly, in view of the fact that the definition of drug paraphernalia in the Colorado Drug Paraphernalia Act requires intent on the part of a violator, be he possessor or seller, regardless of how the state court construes the term "designed," the statute is not unconstitutionally vague on its face with regard to the issue of subjective intent.

Are the Standards Sufficient to Guide Enforcement Officers?

The above, however, does not complete the inquiry. While the definition of drug paraphernalia in the Colorado Act meets the subjective intent requirement, that fact does not end our quest to determine whether the definition meets the constitutional test. It is necessary, in addition, that the Act provide objective standards for determining what items are likely to fall within the statutory definition. Although possessors and sellers of drug paraphernalia may be held to a higher standard of knowledge in determining whether an item which they possess or sell constitutes drug paraphernalia, Papachristou v. Jacksonville, *supra*, 405 U.S. at 162, such is not true with respect to law enforcement officers. We, therefore, must consider whether House Bill No. 1190

provides explicit standards so that law enforcement officers may not make arbitrary, erratic and discriminatory decisions. See Grayned v. City of Rockford, *supra.*

We acknowledge that it is not necessary for reasonable men to consistently reach the same conclusion in applying objective standards to a given factual situation. Thus, the fact that different minds may reach different results when seeking to determine whether a given object falls within the statutory definition of drug paraphernalia does not render the statute void for vagueness. The Supreme Court in United States v. Petrillo, 332 U.S. 1, 7; 67 S.Ct. 1538, 1541 (1947) said:

> That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. * * * [T]he constitution does not require impossible standards.

See also, Winters v. New York, 333 U.S. 502; 68 S.Ct. 665 (1948).

Notwithstanding the impossibility of defining standards with precision to determine whether a legislative object falls within the statutory definition of drug paraphernalia, the Act must, nevertheless, set forth sufficient standards to guard against arbitrary law enforcement. The Colorado Act lists eleven factors to be considered which are sufficiently positive and concrete. It is argued by appellees that these standards are, however, for the *exclusive* use of the court, that they are only to be used by the court in its discretion, and that this results in confusion. We disagree. Why would the General Assembly provide standards for the court's use *only?* It is more logical to conclude that the Assembly intended that the court would ultimately use these standards as part of the definition of the crime. If the court judges by reference to the standards, the enforcement machinery must also follow the standards. Enforcement authorities cannot ignore the definition. Does the fact that the court

is said to have discretion in applying the standards render the Act unlawfully vague? We say no. Our view is that the Assembly recognized that some of the standards may not apply in each and every case, and acknowledged that the court must be authorized to deal with this situation. An unchangeable mandate might be lacking in flexibility and workability.

Our conclusion is, then, that the eleven specific standards to be considered when determining whether an item falls within the definition of drug paraphernalia are not for the court's use alone. They were not intended to be withheld from the enforcement officers or anyone else administering or complying with the statute. The ultimate test as to the sufficiency of any cause of action is whether it will stand up in court. Therefore, law enforcement authorities are effectively compelled to work directly with the enunciated criteria if they are to carry out the Act.

We are aware that many of the courts which have considered this statute have tested the statute with a fine tooth comb to ascertain whether a mandate is set forth which *requires* officers to consider the enunciated factors. Some have upheld statutes as not being vague because these factors were listed and law officials were *required* to consider them when identifying drug paraphernalia. See, The Cashah, Inc. v. Thone, *supra,* wherein the court noted that since no objects were per se drug paraphernalia under the Act, a significant reason for finding the Act not unconstitutionally vague was that factors were listed which law enforcement officials had to consider when identifying drug paraphernalia. The fact that factors were listed for law enforcement officials to consider when defining drug paraphernalia was relied upon by the courts in Delaware Accessories Trade Ass'n. v. Gebelein, *supra,* 497 F.Supp. at 293, and World Imports, Inc. v. Woodbridge Township, *supra,* when upholding the constitutionality of the Acts there under consideration. Similarly, the Act upheld in Florida Businessmen for Free Enterprise v. the State of Florida,

supra, also requires law enforcement authorities to consider a list of specific factors. Contra, Nova Records v. Sendek, *supra*.

Affidavits of officers from various districts in Colorado set forth in the record show that there is confusion as to whether particular items constitute drug paraphernalia. Some of the confusion illustrated by the wide variety of conflicting opinions among law enforcement personnel as to what constitutes paraphernalia may be eliminated by removing the word "adapted" from the definition of drug paraphernalia in the Colorado Act. However, we do not consider it necessary or helpful to sever the wording which is found in § 502, the standards provision. We deem it sufficient to consider the Act as a whole, including its objectives. A construction of the Act as a whole removes doubts as to the effect of some of the wording found in it and dictates the construction which we have given to the entire Act.

In summary, it is our conclusion that the standards in question were designed to be a part of the definition of the statute, and, therefore, that the Act, considered in its entirety, shows a legislative intent to make the eleven standards provided by the Assembly, a part of the definition of the crime.

Accordingly, we conclude that the Act avoids the charge that it is vague, and therefore in violation of the due process clause of the Fourteenth Amendment.

Therefore, we must reverse the judgment of the district court and remand the cause for further proceedings consistent with the analysis contained in this opinion.

It is so ordered.

UNITED STATES DISTRICT COURT
Southern District Of Indiana
Terre Haute Division

INDIANA CHAPTER (NORML), et al.,

Plaintiffs,

vs.

THEODORE L. SENDAK, et al.,

Defendants.

No. TH 75-142-C

MEMORANDUM OF DECISION

This matter is before a Three-Judge Court as authorized by 28 U.S.C. §2281. Repeal of 28 U.S.C. §§2281, et seq., does not apply to this action since this action was filed before August 12, 1976, the date of appeal. The Honorable Thomas E. Fairchild, Chief Judge of the United States Court of Appeals for the Seventh Circuit, designated the Honorable Luther M. Swygert, Judge of the United States Court of Appeals for the Seventh Circuit, and the Honorable Cale J. Holder, Judge of the United States District Court for the Southern District of Indiana, to serve with the Honorable S. Hugh Dillin as members of a Three-Judge Court to hear this cause.

Background

Plaintiffs can be arranged in three groups. The first plaintiff group is the Indiana Chapter of the National Organization for the Reform of Marijuana Laws, Inc. (NORML), an organization seeking the easing of restrictions on marijuana use. The second group consists of five individuals who are Indiana residents and who are in the business of manufacturing, selling, or distributing items that are either specifically mentioned in the challenged statute or arguably come within the general ban of the statute. The third group is made up of four persons who are Indiana residents and who posesss items that may fall within the statutory ban.

Five defendants are named. The first is Theodore L. Sendak, the Attorney General for the State of Indiana. Sendak is sued both individually and in his official capacity. The other four defendants are the prosecuting attorneys for four Judicial Circuits of Indiana: the 19th Circuit, the 10th Circuit, the 43rd Circuit, and the 1st Circuit.

Plaintiffs filed their original complaint on July 18, 1975 seeking injunctive and declaratory relief. In particular, plaintiffs requested the District Court to declare Sections 8 and 9 of Senate Enrolled Act 95, proposed I.C. (1971) 35-24.1-4.1-8 and 35-24.1-4.1-9, as amended by Acts 1975, P.L. 338, effective on or about August 15, 1975, in violation of the United States Constitution. Plaintiffs labeled the suit an action in equity authorized by 42 U.S.C. §1983. Jurisdiction was based on 28 U.S.C. §§1331, 1343(3), 2201, and 2202.

On August 1, 1975, the District Court issued an order temporarily restraining defendants from enforcing Sections 8 and 9 of Senate Enrolled Act 95 until further order of the Court. On October 7, 1975, defendants filed a motion to dismiss, alleging that the District Court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief may be granted.

In 1976, the Indiana General Assembly revised and recodified the criminal laws of Indiana. Certain portions of I.C. 35-24.1-4.1-8 and -9 were amended, and the two sections were recodified as I.C. 35-48-4-8 and -9. The recodification was to become effective on October 1, 1977.

On August 3, 1977, defendants filed a motion to dismiss for failure to prosecute. On August 24, 1977, plaintiffs filed a motion to reinstate the original complaint and a request to the Clerk for entry of default of the defendants. Defendants filed a motion to strike the request to the Clerk for entry of default on the same day. All of these motions were rendered moot when

plaintiffs filed an amended complaint on September 28, 1977.

In their amended complaint, plaintiffs again sought declaratory and injunctive relief, asking the District Court to declare the amended sections unconstitutional and to bar defendants from enforcing those sections. On September 29, 1977, the District Court issued an order restraining defendants from enforcing Acts of 1977, P.L. 340, Sec. 103, 104, as codified in I.C. 35-48-4-8 and -9 until further order of the Court.

Defendants filed a motion to dissolve the District Court's restraining order on September 30, 1977, and filed a motion to dismiss the amended complaint on October 20, 1977, alleging lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Defendants also petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandate and prohibition, asking that Court to dissolve the restraining order. The petition was denied on November 16, 1977.

On April 20, 1979, a Three-Judge Court heard oral argument on the motion to dismiss and on the substantive issues raised by the original and amended complaints.

Discussion

Defendants' Motion to Dismiss

Defendants have based their motion to dismiss on three grounds: lack of jurisdiction, the doctrine of abstention, and failure to state a claim. The arguments made by defendants in support of their position that plaintiffs have not stated a claim will be addressed in the discussion of the merits of this action. The two procedural grounds for dismissal will be treated first.

Defendants maintain that this Court lacks subject matter jurisdiction. They argue that a suit against a state attorney general and prosecuting attorneys in their

official capacities is a suit against state agencies and thus, is not a suit properly brought under §1983, which only authorizes suits against "persons."

Defendants' jurisdictional argument is unconvincing. The jurisdictional objection stems at least in part from the position that the states are not under the domination of the federal government. The Supreme Court of the United States has wrestled with the tension between the desire to preserve state autonomy and the need to enforce federal law. In Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Supreme Court distinguished between kinds of relief sought in order to resolve the tension. The high Court held that when state officials are sued, prospective but not retrospective relief may be given. The rationale for the holding was that courts could enjoin officials from disobeying the dictates of the Constitution and thus ensure the supremacy of federal law without resorting to the more intrusive tool of individual damages.

Since plaintiffs seek only prospective relief, there is no issue of state immunity. More importantly, the compromise reached by the Supreme Court in *Edelman, supra,* suggests the answer to the question of whether officials sued in their official capacities are immune from §1983 suits.

The Court of Appeals for the First Circuit has noted that, while the Supreme Court has not explicitly ruled, lower court decisions point to a position that makes the same distinction between types of relief made in *Edelman, supra.* The Court went on to hold that while many government entities are immune from suit under §1983, government officials sued in their official capacities do not share that immunity, at least when only prospective relief is sought. Maria Santiago v. Corporation de Renovacion Urbana Y Vivienda de Puerto Rico, 554 F. 2d 1210 (1 Cir., 1977).

This holding by the First Circuit does not stand alone. Section 1983, along with its jurisdictional counterpart

§1343(3), has served as the basis for many suits against public officials in their official capacities. See e.g., Rochester v. White, 503 F.2d 263 (3 Cir. 1974); Ybarra v. Los Altos Hills, 503 F.2d 250 (9 Cir. 1974). Indeed, defendants' view of §1983 would result in few if any §1983 cases being successfully brought.

Section 1983 requires the "person" sued to have acted under color of state law. When a person acts under color of state law, he usually represents the state. If defendants' view of §1983 were adopted, §1983 suits would be allowed only when the state official has acted beyond the scope of his authority. At all other times, the official would represent the state and be able to claim its immunity for himself. Section 1983 simply is not so limited a tool as to be available only to redress abuse of power by state officials. Suits seeking prospective relief against state officials sued in their official capacities are properly brought under §1983. Therefore, this Court does have subject matter jurisdiction over this suit, with jurisdiction properly grounded on 42 U.S.C. §1983 and 28 U.S.C. §1343(3).

Defendants next argue that even if this Court has jurisdiction, the doctrine of abstention requires dismissal. This argument also fails.

Abstention is a judicially created qualification of federal jurisdiction in actions against state officials. The Supreme Court explained the doctrine of abstention in Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The Court listed three factors that were present in that case and that called for abstention. The first factor is present when the disposition of a state law question involved in the case can moot or narrow the scope of the federal constitutional issue. The second factor occurs when the state law question raises difficult, obscure, or unclear issues of state law. The third factor arises when a federal decision could later be in conflict with subsequent state court resolutions of issues concerning the same

state program or regulatory scheme and thus result in confusion over that ongoing program.

In determining the applicability of abstention, it must be remember that abstention is the exception, not the rule. The issue of abstention arises only after a litigant has fulfilled all of the statutory requirements for federal jurisdiction. Thus, whenever a federal court abstains, the litigant is forced to undergo state procedures or await state enforcement action in an area where Congress has said he is entitled to access to federal courts. While abstention is an effective tool to avoid needless friction between federal and state courts, it is a tool to be used cautiously.

The Supreme Court listed three factors in *Pullman, supra,* that called for abstention. It is unclear whether the presence of just one or two of those factors mandates abstention. A strong argument can be made that all three factors need to be present before abstention is proper. This Court, however, need not decide if all three factors must be present since none of the factors is present in this case.

Since plaintiffs raise a vagueness objection, it is a remote possibility that any construction of the statutory provisions of the statute by the state courts would alter the federal constitutional issue. The Supreme Court came to a similar conclusion in Bagett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

In *Bagett, supra,* the Court reversed a district court's decision to abstain from a suit in which the plaintiffs challenged an oath requirement as unconstitutionally vague. The Court explained:

> ". . . their complaint is that they, about 64 in number, cannot understand the required promise, cannot define the range of activities in which they might engage in the future, and do not want to forswear doing all that is literally or arguably within the purview of the vague terms. In these circumstances

> it is difficult to see how an abstract construction of the challenged terms such as precept, example, allegiance, institutions, and the like, in a declaratory judgment action could eliminate the vagueness of these terms. It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this." 377 U.S. 378.

As was the case in *Bagett, supra,* plaintiffs here challenge the provisions as being unconstitutionally vague. Resort to state court for resolution of state law issues cannot moot the constitutional issue nor shape the scope of the issue. Despite individual enforcement proceedings, the statutory provisions will remain open to a vagueness challenge. Only extensive litigation over the meaning of the general defintion of paraphernalia and the meaning of the numerous terms listed as examples of paraphernalia will end the issue of vagueness. The first factor listed in *Pullman, supra,* is not present.

Since the issue raised by plaintiff is that of constitutional vagueness, this is not a case which raises difficult or obscure state law questions. The state courts enjoy no special expertise in determining whether a statute violates the United States Constitution because of vagueness. Moreover, the case before this Court does not involve a morass of complicated Indiana law. The only statutes which need to be considered are the very statutes under attack. Therefore, the second factor listed in *Pullman, supra,* is not present.

Finally, a decsion by this Court as to the constitutionality of the statutes in question will not interfere with any ongoing state program or regulatory scheme. This is not a case of a federal court ruling on certain aspects or procedures of a state program which will continue after the ruling. A decision in this case as to the constitutionality of the paraphernalia statutes will

result either in the end of such regulation or the unchanged continuation of such regulation. Thus, the third factor cited in *Pullman, supra,* is not present.

Since none of the factors discussed in *Pullman, supra,* are present, much less any combination of those factors, this case is not an appropriate case for abstention. Before turning to the merits of the case, it is necessary to deal with one more jurisdictional objection.

Defendants argue that plaintiffs have no standing to challenge the alleged vagueness of the provisions in question. Defendants point out that plaintiffs have never been charged with violating the provisions and argue that plaintiffs therefore bring no real controversy before the Court but offer only hypothetical cases and problems. This argument is unconvincing.

Title 28 U.S.C. §2201 provides federal courts with jurisdiction to make declaratory judgments in order to allow parties to have a determination of their rights and obligations without having to risk criminal sanctions. Such declaratory relief is especially appropriate in this case. Plaintiffs have alleged that one of the harms resulting from the vagueness of the statute is that people will avoid possessing or selling any item arguably within the statutory ban, even though that item is lawful. Thus, in order to avoid the uncertainty stemming from the statute's vagueness, people will not engage in lawful activity in order to avoid involvement in criminal prosecutions where the statute's reach and vagueness could be challenged. In such a situation, declaratory relief is appropriate. There is a real controversy between the parties over the constitutionality of these statutory provisions. A resolution of this controversy need not depend on a criminal enforcement proceeding that may occur in the future.

The Merits of the Complaint

While plaintiffs have recited a litany of constitutional objections to the statutory provisions in ques-

tion, there is only one real issue involved in this case: whether the provisions are unconstitutionally vague. The first step in dealing with the claim of vagueness is to examine the provisions.

When this suit was originally filed, the paraphernalia statutes in force were I.C. 35-24.1-4.1-8 and -9, as amended by Acts 1975, P.L. 338. These sections were repealed by Acts 1976, P.L. 148 and reenacted as I.C. 35-48-4-8 and -9, as amended by Acts 1977, P.L. 340. Thus, the statutory provisions still in existence are I.C. 35-48-3-8 and -9. It is the constitutionality of these provisions that must be determined.

Indiana Code 35-48-4-8, as amended by Acts 1977, P.L. 340 provides:

> "(a) A person who possesses, with intent to violate this article, an instrument designed for smoking or injecting a controlled substance commits possession of paraphernalia, a Class A misdemeanor. However, the offense is a Class D felony if the person has a prior conviction of an offense involving paraphernalia."

Indiana Code 35-48-4-9, as amended by Acts 1977, P.L. 340, provides:

> "(a) A person who:
>
> (1) knowingly or intentionally manufactures or delivers paraphernalia;
>
> (2) possesses, with intent to manufacture or deliver, paraphernalia;
>
> commits dealing in paraphernalia, a Class D felony.
>
> (b) "Paraphernalia" means an instrument used, designed for use, or intended for use in ingesting, smoking, administering, or preparing marijuana, hashish oil, or cocaine; and includes:
>
> (1) metal, wooden, acrylic, glass, stone, plastic, or ceramic marijuana or hashish pipes with or

without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes designed for use or intended for use with marijuana, hashish, hashish oil, or cocaine;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips;

(6) separation gins designed for use or intended for use in cleaning marijuana;

(7) cocaine spoons and vials;

(8) chamber pipes;

(9) carburetor pipes;

(10) electric pipes;

(11) air driven pipes;

(12) chilams;

(13) bongs; and

(14) ice pipes or chillers."

The requirement that laws not be vague emanates from the guarantee of due process articulated in the Fifth Amendment. The requirement is applied to the states and their subdivisions by the Fourteenth Amendment and is a limit on the exercise of government power. Due process does not impose a constitutional requirement of absolute precision in legislative enactments. Due process does not mandate fair notice to those subject to the law and sufficient guidelines to those enforcing the law.

A statute is unconstitutionally vague when the wording used fails to give fair notice of what is prohibited. A statute must communicate the difference between lawful and unlawful conduct. Especially in the area of criminal law, a statute must be explicit enough to inform those subject to the law what conduct will result in criminal liability. People of ordinary intelligence cannot be made to guess at the meaning of a criminal law. See

e.g., Connally v. General Construction Co., 269 U.S. 385, 391 (1962); Winters v. New York, 333 U.S. 507, 515-516 (1948); Bambu Sales, Inc. v. Gibson, 474 F.Supp. 1297, 1304 (D.N.J. 1979).

Due process also requires sufficient guidelines for those who apply the law in order to prevent selective or arbitrary enforcement. The void-for-vagueness doctrine is designed in part to preclude unfettered government discretion in enforcing a statute so vague that evenhanded administration of the statute is impossible. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Goguen, 415 U.S. 566 (1974); United States v. Lambert, 446 F.Supp. 890, 896 (D.Conn. 1978).

The first statutory provision challenged as unconstitutionally vague is I.C. 35-48-4-8. This provision makes it a crime to possess paraphernalia with the intent to violate the drug laws. Paraphernalia is defined as "an instrument designed for smoking or injecting a controlled substance."

The definition of paraphernalia used in the possession of paraphernalia statute fails to meet the standard of sufficient clarity mandated by the guarantee of due process. It is unclear what is meant by an instrument "designed" for drug use. The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with I.C. 35-48-4-8 what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.

The definition of paraphernalia also fails to answer the question, "'designed' by whom?" The statute may be limited to instruments designed by the manufacturer for drug use. The crucial problem is that objects arguably within the scope of the statute include many instruments that can be used for legitimate purposes as well as for the ingestion of drugs. The shop owner or buyer may be surprised to learn that his separation gin, pipe, hand mirror, or paper clip qualifies as paraphernalia because the original manufacturer had built the item with the idea that it would be used for the ingestion of controlled substances. The uncertainty continues if the statute is read to include as paraphernalia any item designed or marketed by the shop owner for drug use. The buyer will find himself in possession of an item that is considered to be paraphernalia because of the assumption or intent of another.

In its broadest sweep, the statutory definition of paraphernalia could be read to include any item designed by the possessor of the item for drug use. Again there is no way of knowing what items are paraphernalia and what items are lawful to possess. One cannot tell in advance whether a paper clip, hand mirror, teaspoon, or corncob pipe will be labeled paraphernalia. Whether an item is paraphernalia will depend on the characterization given by the arresting officer, deputy prosecutor, or judge. In addition to the lack of notice given to those subject to the statute, this broad definition of paraphernalia is not sufficiently explicit to prevent arbitrary or selective enforcement.

Whether an instrument is "designed" for drug use will depend on the state officials' evaluation of the character and purpose of the possessor of the device. Since the devices capable of use with drugs often have legitimate uses as well, the state officials—arresting officer, prosecutor, judge—will decide for which use the individual has the device.

Plaintiffs argue that this possibility of arbitrary enforcement constitutes a violation of equal protection, since the lack of guidelines will result in disparate treatment. For example, plaintiffs argue that an owner of an exclusive export-import boutique that sells ornate smoking devices will not be considered to be in possession of paraphernalia, whereas the owner of a record store that caters to young people and which sells the same device will be viewed as possessing paraphernalia. Such predictions of disparate enforcement cannot be the basis of any ruling by this Court. Moreover, the constitutional infirmity is more properly one of vagueness than equal protection. The real difficulty with the definition of paraphernalia is that the owner of the export-import boutique is in the same quandary as the owner of the record shop. Whether the items sold in either the boutique or record shop will be deemed to be paraphernalia depends on an ad hoc characterization by state or county officials. Such a state of uncertainty for all citizens constitutes impermissible vagueness.

Defendants argue that even with all of the notice problems inherent in I.C. 35-48-4-8 there is no unconstitutional vagueness because of the intent requirement of the provision. In Screws v. United States, 325 U.S. 91 (1944), the Supreme Court did hold that a requirement of willful or purposeful action obviates the need for notice; however, the intent requirement of I.C. 35-48-4-8 fails to eliminate the need for notice.

Indiana Code 35-48-4-8 requires that to be guilty of possession of paraphernalia, a person must possess paraphernalia "with intent to violate this article"—that is, with intent to violate the drug laws of Indiana. The reason this requirement does not obviate the need for notice is that it is a bootstrapping notion of intent. The danger is that intent will be inferred from the mere fact of possession. The Supreme Court used the word "willful" in *Screws, supra,* in order to describe the strong requirement of intent needed to obviate the need for

notice. The rationale of *Screws, supra,* was that there is no need to warn someone of the criminal nature of an act which he already knows is crimianl. Intent to violate the drug laws will have to be determined by looking at all the circumstances. The main, and often only circumstance will be possession of a device deemed on an ad hoc basis to be paraphernalia. Given the inability of the statute to specify what is or is not paraphernalia and given the bootstrapping nature of the intent requirement, there is a clear danger that people who did not intend to violate I.C. 35-48-4-8 and did not think they were in violation of the law will nevertheless be deemed to be in possession of paraphernalia. Such a possibility demonstrates a lack of a sufficient willfulness requirement to save I.C. 35-48-4-8 from unconstitutional vagueness.

The second statute under attack is also unconstitutionally vague. Indiana Code 35-48-4-9 seeks to punish dealing in paraphernalia. Dealing is defined as possessing paraphernalia with intent to manufacture or deliver. Paraphernalia is defined as an "instrument used, designed for use, or intended for use" in preparing, ingesting, or administering marijuana or cocaine.

The same vagueness problems previously discussed with regard to I.C. 35-48-4-8 are present with the use of the word "designed." Moreover, I.C. 35-48-4-9 suffers from additional flaws of vagueness.

If the phrase "designed for use" is limited to items that the manufacturer or distributor designed for drug use, I.C. 35-48-4-9 does not give fair notice to manufacturers who wish to avoid violating the provision. The statute includes in its definition of paraphernalia instruments "used" and "intended for use." This means that a person could be deemed a dealer in paraphernalia because the buyer of his product intends to use the item to administer drugs. For example, a maker of corncob pipes or tie bars could be brought under the provision's sanctions because a customer of his has devious designs for the otherwise legitimate item. A maker of

pipes, spoons, or hand mirrors could be found to be in violation of the statute because his legitimate products are bought by a middleman who intends to advertise and sell the products as drug devices or who sells them simply as pipes or spoons but to someone who later uses the items to ingest drugs. Thus, someone can be considered to be dealing in paraphernalia because of the intent of someone once, twice, or even several times removed. The same problem of lack of notice faces a seller who may sell items such as pipes or spoons or paper clips to someone who intends to use the items for the ingestion of drugs rather than for their legitimate functions.

Indiana Code 35-48-4-9 does not sufficiently separate lawful and unlawful conduct. The provision gives no fair notice to those subject to its strictures, and the provision does not provide sufficient guidelines to those enforcing the statute. Therefore, I.C. 35-48-4-9 is unconstitutionally vague. Moreover, the intent requirement of the provision does not obviate the need for notice. The intent required by I.C. 35-48-4-9 is intent to manufacture or deliver the devices. Obviously, the manufacturer of the pipes or tie bars or paper clips intends to build his product, and the distributor of the product intends to deliver the product. The unresolved uncertainty is whether the item manufactured or delivered is paraphernalia. The provision does not give a sufficient answer to that question.

While the general definition of paraphernalia supplied in I.C. 35-48-4-9 is so vague as to doom the provision, there are additional problems with the specific examples of paraphernalia listed. These problems stem from overbreadth as well as vagueness.

A paraphernalia statute that prohibited possession of pipes would be subject to a challenge of overbreadth in that the statute would prohibit lawful activity in its effort to reach unlawful conduct. In trying to avoid overbreadth, I.C. 35-48-4-9 is unconstitutionally vague.

The statute does not ban pipes, but the provision does prohibit "marijuana pipes." Labeling the outlawed pipes as "marijuana pipes" is a conclusory qualification that fails to avoid problems of vagueness. No definition of "marijuana pipes" is given, but it would appear that any pipe used or designed for use with marijuana would qualify. This means that the same unconstitutional vagueness that results from the definition of paraphernalia as any item "designed" for drug use is present. The same vagueness problem afflicts the water pipe and separation gin examples listed in I.C. 35-48-4-9.

"Roach clips" and "cocaine spoons and vials" are two other examples of paraphernalia listed in I.C. 35-48-4-9. The unconstitutional vagueness that would result from listing as paraphernalia clips or spoons "designed or intended" for drug use is avoided only by using a conclusory label. It is doubtful that the examples include only items specifically sold as roach clips or cocaine spoons. The ban could easily be avoided by selling the items as "clips" or "spoons." The examples more likely include all spoons or clips that are used or "designed" to be used or that could be used with drugs. The use of a conclusory label fails to avoid the problem of vagueness.

In summary, this Court holds that I.C. 35-48-4-8 and I.C. 35-48-4-9 are unconstitutional because they fail to meet the due process requirement of sufficient explicitness. Because I.C. 35-48-4-8 and I.C. 35-48-4-9 fail to provide fair notice to those subject to their sanctions and do not include sufficient guidelines to prevent arbitrary and selective enforcement, this Court finds these statutory provisions unconstitutionally vague.

Dated this 4th day of February, 1980.

/s/ Luther M. Swygert
Luther M. Swygert, Judge
United States Court Court of Appeals
For the Seventh Circuit

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge
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Southern District of Indiana

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DISSENTING OPINION

I respectfully disagree with the majority opinion or ruling of this three-judge District Court.

In 1975 the Indiana General Assembly amended Indiana's Controlled Substances Law. On July 18, 1975 the plaintiffs filed this action to have Sections 8 and 9 thereof declared unconstitutional. A temporary restraining order issued from the assigned judge and expired in ten days without a three-judge preliminary injunction hearing. In 1977 the Indiana General Assembly again amended Indiana's Controlled Substances law which amounted to a reenactment of Sections 8 and 9. On September 28, 1977 plaintiffs filed an amended complaint to have Sections 8 and 9 of the reenactment declared unconstitutional. A temporary restraining order again issued from the assigned judge and expired in ten days. Thus a duly enacted law of the sovereign State of Indiana has been stymied in the sanctuary of the United States District Court by the inaction of the plaintiffs for over three years.

The legislative bodies of the National and State governments have actively pursued the mission of control of the drug traffic. The Congress of the United States prefaced its drug control laws with findings and declarations which included:

> Title 21 U.S.C. Section 801(2) "The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."

Congress did not preempt such control of drugs. Title 21 U.S.C. Section 903.

The legislative branch of Indiana believed that the knowing possessor, manufacturer and deliverer of paraphernalia intending such paraphernalia to be used in violation of the drug control law should also be proscribed. This case involves a conflict between the in-

terests of those who seek to profit from the use of illicit drugs and the State of Indiana who seeks to remove a profitable enterprise based on illegal drug use from the tacit sanctions of the law. The majority ruling defeats the will and intent of the people of Indiana as twice expressed through their legislature and will be interpreted as placing a judicial stamp of approval on a business intended to capitalize on the use of controlled substances. The most visible examples of such business can be found in Indiana cities where educational institutions are located. Those institutions bring numbers of young persons, often freed for the first time of influence of older persons, into an atmosphere where they can easily be attracted to unsafe, unwise, unhealthy, or illegal activities in the drug scene. It appears a bit ridiculous to permit the merchants to openingly manufacture, possess, sell and deliver paraphernalia designed and intended for use in violating the controlled substance laws and at the same time proscribe the use of controlled drugs. Such practice undermines the objective of and enforcement of the drug control statutes by making it profitable, casting doubt in citizens mind of the integrity of drug control laws and tends to encourage and recruit violators.

The plaintiffs have suggested another basis for their claim of unconstitutionality of Sections 8 and 9 of the Act in question to which the majority did not respond. Plaintiffs assert that because a Section 8 or Section 9 violation by manufacture of, possession of, and delivery of paraphernalia designed for use of forbidden drugs cannot exist without the existence of proof of another crime involving controlled substance, somehow such renders Sections 8 and 9 constitutionally infirm. If such was the law many of our criminal statutes would be unconstitutional. No research is required to reject such a conclusion. Many crimes require proof of lesser included offenses and I can first refer to the crime of homicide. It was suggested that since another crime must be proved in order to prove a Section 8 or Section 9 offense that Sections 8 and 9 enactments by the General Assembly were useless. This, if true, may be a substantial basis

for lobbying the Indiana General Assembly but cannot support a finding of unconstitutionality of Sections 8 and 9.

A Section 8 or Section 9 offense is not duplicitous of any of the other offenses relating to controlled substances. A Section 8 or Section 9 offense conviction will not support a plea of double jeopardy of a charge of violation of any of the other offenses relating to controlled substances. A specific separate legal and factual element in addition to the legal elements and facts of any of the other offenses relating to controlled substances must be alleged in an indictment and proved beyond a reasonable doubt in the courts of Indiana before a defendant can be found guilty of a Section 8 or Section 9 offense. A Section 8 offense has the additional element of "possession with intent to violate this article, an instrument designed for smoking or injecting a controlled substance," a misdemeanor offense named by the Indiana General Assembly as "Possession of Paraphernalia". A Section 9 offense has the additional element of "knowingly or intentionally manufacturing, or delivering, or possessing with intent to manufacture, or deliver an instrument used, designed for use, or intended for use in ingesting, smoking, administering, or preparing marijuana, hashish, hashish oil, or cocaine," a felony offense named by the Indiana General Assembly as "Dealing in Paraphernalia".

The penalty for the offenses in question is moderately more severe than some of the other Indiana offenses relating to controlled substances. Indiana's General Assembly treatment of the need for control of narcotic drugs by outlawing non-medical narcotics is consistent with the objects of the United States Congress and that of other States legislatures. Historically, for over a half century, a network of laws, that were steadily tightened and enlarged, for grappling with a powerful, subtle and elusive enemy of the citizens of this Country have been developed. Sections 8 and 9 of Indiana's law reveal the same continuing determination to turn the screw of the criminal

machinery—detection, prosecution and punishment—tighter and tighter. Indiana's efforts should not be thwarted by the plaintiffs whose tenets include the defeat of control laws of the marijuana drug.

The Indiana General Assembly has given its law enforcers two more choices of laws with which to effectively and practically deal with its advocates of the proscribed drug violaters in Indiana.

The statutory provisions challenged by plaintiffs' September 29, 1977 first amended complaint, Ind. Code (Burns 1977) 35-48-4-8 and 9 were enacted by the General Assembly of Indiana to facilitate the legitimate goals of the Uniform Controlled Substances Act as enacted by Indiana for forty-seven other States. The uniform act does not proscribe possession of paraphernalia with the intent to use such paraphernalia in violation of the Act, but other jurisdictions have enacted legislation similar to the challenged provisions. Such history does not render Sections 8 or 9 constitutional or unconstitutional.

The necessary and essential element of intent to violate the Indiana Controlled Substances Act must be proven before a person may be convicted of a violation of Section 8.

Section 9 similarly contains essential elements of knowledge and intent.

Ind. Code (Burns 1977) 35-48-4-9 reads, in part:

> "Dealing in paraphernalia—(a) A person who:
>
> (1) Knowingly or intentionally manufactures or delivers paraphernalia;
>
> (2) Possesses, with intent to manufacture or deliver, paraphernalia;
>
> commits dealing in paraphernalia, a Class D felony.
>
> (b) 'Paraphernalia' means an instrument used, designed for use, or intended for use in ingesting, smoking, administering, or preparing marijuana, hashish, hashish oil, or cocaine; and includes: * * *."

Under this section, mere possession or manufacture or delivery of an item which might be used to ingest, smoke, administer or prepare one of the described controlled substances is insufficient to constitute violation. Such possession, manufacture or delivery must be intentional. Moreover, the item must be proven to be paraphernalia. Subsection (b) requires the State to show that the defendant has either used the instrument, designed it for use or intended it for use in connection with controlled substances. If a person is unaware of an item's potential use as paraphernalia, or has a legitimate purpose in mind, manufacture, delivery or possession with intent to manufacture or deliver such item escapes proscription under this section. Therefore, the state is not overbroad. It encompasses only possession, manufacture or delivery for a recognized and defined purpose.

Plaintiffs here confront the Court with only a series of imagined hypotheticals. But with even those hypothetical arguments, plaintiffs have failed to meet their burden of overcoming the presumption of constitutionality.

The objectives of the statutory provisions in question are to proscribe the manufacture, possession of, or dealing in and sale of such devices with intent that they be used in the consumption of controlled substances. The goal is legitimate; the means employed by these provisions are neither unreasonably restrictive nor violative of any constitutionally protected rights.

Plaintiffs assert that the statute is unconstitutionally overbroad, claiming that possession of items intended for legitimate uses could be in violation of the statute. However, both Sections 8 and 9 of the Controlled Substances Act (Ind. Code 35-48-1-1 through Ind. Code 35-48-4-14) require that mere possession, manufacture or delivery, without more, is not a violation. Section 8 clearly defines paraphernalia, for the purposes of the statute, as an instrument "*designed for* smoking or injecting a controlled substance" (emphasis supplied) and possession of paraphernalia in violation of Section 8 of the Act can-

not be found unless the possession is coupled with the intent to violate the Act. This intent is specifically required by Section 8. Therefore, the section cannot be overbroad. By definition, an overbroad statute proscribes legal as well as illegal activity. If a person is without the intent required by Section 8, he is not in violation. Violation will only occur where the article is possessed with an intent that it be used to consume controlled substances. This same analysis applies to plaintiffs' attack on Section 9, which incorporates the intent requirement as discussed above, including a requirement of intent for purposes of definition of paraphernalia. Plaintiffs assert that possession of a pipe for smoking of tobacco or legal herbs could be made criminal by Sections 8 and/or 9. Obviously, if the possessor has no intent to use the items in violation of the Controlled Substances Act, or that the items be used in such manner, there can be no violation of Sections 8 and 9.

Plaintiffs attack the provisions as unconstitutionally vague, claiming that possession of any object could be a violation of the provisions, and further alleging that Section 9(b)(1) through 9(b)(14) proscribes possession of items for which there is no common definition. I must again point to the requirements of intent included in both sections. Without proof of intent to use the items or that another use the items for ingesting, smoking, administering, or preparing marijuana, hashish, hashish oil, or cocaine, the State cannot inculpate any person of possession, manufacture, or delivery of paraphernalia. Likewise, possession of the most obvious device could not be a violation without proof of intent. Plaintiffs claim Section 9(b)(1) through (14) contains words which have no meaningful definition. Merely because plaintiffs' edition of *Funk and Wagnalls'* does not identify the common meaning of the words used therein does not mean that the terms, or their meanings are foreign to users of controlled substances. "Paraphernalia" in the context of the drug culture has slang names designed for deception and surreptitious dealings. It means things used in drug use,

equipment; apparatus; trappings; and gear. See Webster's New World Dictionary of the American Language 1067 (College Ed. 1966). Indeed, the statute appears to deal with such persons in terms readily known to them, in order that the provisions be more readily understood. A presumption of constitutionality accompanies this type of legislation. Inherent in this presumption is the power of the legislature to define crimes and to specify punishment. This power remains until the presumption is overcome. Plaintiffs have failed to meet this burden, in my view.

Plaintiffs allege that Sections 8 and 9 are unreasonable and unworkable means aimed at preventing the use of controlled substances, and as such, are violative of the equal protection provisions of the fifth and fourteenth amendments. I find that no discriminatory enforcement of these sections can occur against "head" shops and in favor of tobacconists. If both businesses sell devices with the intent that such items be used in violation of the Controlled Substances Act, both are liable. If the intent is lacking, so is the liability. Certain of plaintiffs allege they would be guiltless victims of enforcement of these sections. However, by their terms, the challenged sections cannot be enforced against any party who lacks the requisite intent and knowledge. If the State were to prosecute any person for violation of Section 9, conviction could not be had without proof of such intent and knowledge. Therefore such plaintiffs, if truly without the requisite intent or knowledge, have nothing to fear from either Section 8 or Section 9.

These sections contain no irrebuttable presumptions. The burden of proof of all essential element—possession, knowledge, and intent—would remain upon the State throughout any prosecution.

By requiring that the State prove *intent* to violate the Controlled Substances Act or proof of knowledge of use, or designed or intended use to violate same *coupled with possession* of the items defined in Sections 8 and/or 9,

these sections give fair warning of the conduct prohibited. The effectiveness of such warning is apparent from the plaintiffs' actions in this case. No reasonable person of ordinary intelligence could read these sections and fail to understand what conduct is proscribed. The sections provide legally fixed standards, including knowledge and intent, and do not leave law enforcement officials, judges, or juries free to decide what conduct is or is not proscribed. The terms of the statutory sections clearly provide criteria by which a person of ordinary intelligence could distinguish lawful from unlawful conduct.

Plaintiffs' reliance on the cases of *Smith* v. *Goguen*, 415 U.S. 566, 94 S.Ct. 1242 and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 as illustrative of statutes held void for vagueness instead serves to distinguish Sections 8 and 9 from statutes which are unconstitutionally vague. The statutes involved in those cases proscribed acts or conduct without requiring any showing by the State of criminal intent. The opposite is true of Sections 8 and 9 here. Without proof of *intent* to violate other provisions the Controlled Substances Act, possession of any item described by Sections 8 or Section 9 is not made illegal by such sections. Sections 8 and 9 do give fair notice of forbidden conduct to any person contemplating such conduct. Further, the sections' requirements of proof of knowledge and intent as discussed previously in addition to proof of possession or dealing prevent these sections from encouraging arbitrary and erratic arrests and convictions.

Plaintiffs allege the punitive provisions of Sections 8 and 9 to be cruel and unusual punishment in violation of the eighth amendment. Such charge is totally devoid of merit. The legislature here is combatting use of controlled substances and comparable fines and terms of incarceration are totally appropriate and constitutional.

Plaintiffs attack these provisions as contrary to the Constitution's guarantee of equal protection. But the

plaintiffs fail to show that they have become members of a "suspect class" as protected by the doctrine, or that the provisions would burden any fundamental right. Without such showing the statute must be presumed to be constitutional and should be upheld. There is no fundamental right to possess items designed for use of controlled substances with intent to so use them or that others so use them.

Plaintiffs' attacks based on the right to privacy and the commerce clause are equally spurious. No jurisdiction has found possession or use of controlled substances in one's home to be protected under the United States Constitution. A State may legislatively legalize or "decriminalize" use or possession of some narcotics or controlled substances, or may enact legislation which extends a shield of privacy to such conduct in one's home. But such legislation or holding is not mandated by the Constitution of the United States. The action of the Indiana legislature in enacting the challenged sections while perhaps not enlarging the area protected under the penumbra of the United States Constitution's privacy safeguards, certainly does nothing to abrogate those same safeguards.

As to plaintiffs' commerce clause argument, little need be said. These sections clearly are reasonable exercises of the State's police power which are rationally related to legitimate goal—enforcement of the Controlled Substances Act. As the sections cannot be violated without the above-mentioned elements of intent and knowledge, no innocent commerce would be burdened thereby. If interstate commerce in violation (with the requisite intent) is hampered by enforcement, such enforcement cannot be unreasonable. The mere fact that conduct is proscribed in one State and not in another does not necessarily violate the commerce clause. Congress certainly has not sought to pre-empt this area of litigation from State action. In fact the reverse is true. Congress has encouraged the States to enact legislation in this area.

The above responses to plaintiffs' claims support the challenged provisions on the merits. They do not consider other arguments which these defendants have, in my opinion, successfully presented. Clearly, these plaintiffs lack any standing to challenge the constitutionality of these sections. There has been no enforcement, consequently, there has been no possibility of deprivation of any constitutional right. There is no real case or controversy before this panel which presents real and individual facts from which such deprivation might be found. Indeed, if plaintiffs' possession of any items is so innocent as they insist, plaintiffs will not be liable under the sections when they are in force. Thus, the same conclusion is reached upon defendants' motions as is reached on the merits.

Plaintiffs, who profess no intent to use any items or deal in any items intended to violate the Controlled Substances Act, cannot claim an actual controversy with the State as they cannot be convicted of violation of Sections 8 and/or 9 without proof of such intent.

Plaintiffs can show no injury in fact, nor is the interest they seek to protect (the ability to possess or deal in, with intent to violate the Controlled Substances Act, paraphernalia) within any statutory or constitutional guarantee asserted by plaintiffs. Without such showing, plaintiffs have no standing to bring this action.

As no State Court has yet placed any construction on the language of these sections, the majority's preemptive decision deprives the State of the opportunity to construe these sections within the constitutional umbrella, a construction easily arrived at, as the foregoing illustrates. (One could by examination of the record of this case note the reasons for such failure of State action—two "temporary" restraining orders, granted without notice or hearing and in disregard of repeated motions to dismiss or dissolve by defendants which have remained in effect sequentially since August 1, 1975.) Clearly, plaintiffs' action and the decision of the ma-

jority stand opposed to the doctrines of standing, ripeness and abstention. Plaintiffs' pre-emptory attack on the sections and their summary nullification by this Court, both before and after the majority ruling have deprived the people of the State of their right to self-government in adopting legitimate measures and means for restricting criminal conduct.

The majority could have salvaged Sections 8 and Section 9 under the savings clause of the Indiana statute by limiting such opinion or ruling to the word "used" in Section 9(b). Instead all of Sections 8 and 9 have been struck down without the opportunity for an Indiana Court construction of Indiana laws.

I find Ind. Code (Burns 1977) 35-48-4-8 and 9 constitutional, that judgment denying plaintiffs' requests should be entered and I would DISMISS the action of plaintiffs with costs to be assessed against the plaintiffs.

Dated this 4 day of February, 1980.

/s/ Cale J. Holder

Cale J. Holder, Judge, United States District Court for the Southern District of Indiana, Designated Member of Three-Judge Trial Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LAZY, J., LTD. A Pennsylvania Corporation, QUICK-DRAW ACCESSORIES, INC., A Pennsylvania Corporation, DAVID A. TALMAS, an individual, JAMES E. BAUER, an individual,

Plaintiffs,

vs.

THE BOROUGH OF STATE COLLEGE,

Defendant.

CIVIL ACTION NO. 80-1167
(Filed January 30, 1981)

MEMORANDUM AND ORDER

Plaintiffs Lazy J., Ltd., Quickdraw Accessories, Inc., David A. Talmas and James E. Bauer filed the above-captioned action on October 10, 1980 seeking to enjoin the Defendant from enforcing Ordinance No. 982, The Drug Paraphernalia Ordinance of the Borough of State College. On October 29, 1980 a hearing was held before the Court on the question of whether State College Borough should be enjoined from enforcing Ordinance No. 982. Today, for the reasons that follow, the Court will enter an Order declaring Ordinance No. 982 unconstitutional and enjoining the Borough of State College from enforcing its provisions.

The issue presently before the Court is hardly one of first impression. In fact, this is one of a score of recent District Court opinions judging the constitutionality of drug paraphernalia ordinances, and thus far decisions have gone both ways.[1] On the Circuit level, however, three

[1] To date, drug paraphernalia statutes have been upheld as Constitutional in the following cases: Levas v. City of Antoich, No. 80-C-1574 (N.D. Ill. Aug. 15, 1980);

recent decisions have held drug paraphernalia statutes unconstitutional in whole or in part.[2] Therefore, realizing that so many courts have faced these issues, we will attempt to explain our decision with as much brevity as circumstances will allow.

Although Plaintiffs have raised several grounds in their challenge to the Borough Ordinance, the primary issue we face is whether the Ordinance is so vague as to violate the due process clause of the Fifth and Fourteenth Amendments to the Constitution. In *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972), the Supreme Court described the policies behind the due process doctrine of vagueness.

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[1] (Continued)
World Imports, Inc. v. Woodbridge Township, 493 F. Supp. 428 (D.N.J. 1980); Delaware Accessories Trade Association v. Gebelein, No. 80-285 (D.Del. 1980); Florida Businessmen for Free Enterprise v. City of Hollywood, No. 80-6157 (S.D. Fla. Aug. 29, 1980); Casbah, Inc. v. Thone, No. 80-0-271 (D. Neb. Sept. 26, 1980); Florida Businessmen for Free Enterprise v. Florida, No. TCA 80-0954 (N.D. Fla. Sept. 30, 1980); Tobacco Accessories v. Treen, No. 80-3372 (E.D.La. Oct. 28, 1980); Mid-Atlantic Trade Accessories Trade Association v. Maryland, No. H-80-1343 (D. Md. Nov. 11, 1980); Nova Records, Inc. v. Sendak, No. IP 80-431-C (S.D.Ind. Dec. 9, 1980).

Other decisions have held drug paraphernalia statutes to be unconstitutional in whole or in part. These include Knoedler v. Roxbury Township, 485 F. Supp. 990 (D.N.J. 1980); Record Museum v. Lawrence Township, 481 F. Supp. 768 (D.N.J. 1979); Bambu Sales Inc. v. Gibson, 474 F. Supp. 1297 (D.N.J. 1979); Indiana Chapter, NORML, Inc. v. Sendak, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980); Backdoor Records v. City of Jacksonville, NO. LRC 80-314 (E.D. Ark. Jan. 8, 1981).

[2] Geiger v. City of Eagen, 618 F. 2d 26 (8th Cir. 1980); Record Revolution No. 6, Inc. v. City of Parma, Civ. No. 80-3308 (6th Cir., Dec. 8, 1980); The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, No. 80-1462 (7th Cir., Jan. 12, 1981).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Id., at 108-09.

It is the opinion of the Court that the Borough Ordinance fails to meet both of the *Grayned* requirements, (1) it fails to provide adequate notice of what conduct it intends to make illegal, and (2) it impermissibly delegates subjective policy decisions to policemen, judges and juries. And because the inherent vagueness of the law cannot be cured by the severance of any particular provision, the Court will enter an Order today declaring Ordinance No. 932 of the Borough of State College unconstitutional in its entirety.

The Court has reached its opinion for the following reasons. First, we find that the phrase "designed for use" as contained in the definition of drug paraphernalia is improperly vague. Second, we reject the notion that the vagueness of the Ordinance can be cured by the requirement of specific intent. Third, as noted above, we find that the Ordinance improperly delegates subjective policy matters to policemen, judges and juries. Finally, we have concluded that the prohibition against advertising drug paraphernalia contained in Section 3(D) of the Ordinance is unconstitutionally vague and overbroad. We will now briefly address each of these issues.

The central target of recent decisions striking down drug paraphernalia ordinances as vague has been the phrase "designed for use." The Borough Ordinance defines drug paraphernalia in pertinent part as follows:

> "The term "Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use. . . (with a controlled substance)."

The Ordinance goes no further in defining or limiting the meaning of the word "designed". As the statute reads, therefore, "designed" could signify devices that have been specifically manufactured for the purpose of the ingestion of drugs, or it could include any device which has a legitimate function, but whose properties are such that it could be used for the ingestion of drugs. This all inclusive definition of drug paraphernalia has several harmful effects. First, it allows the intent of persons other than those charged under the Ordinance to be controlling on the definition of drug paraphernalia. Thus despite the assurances of the Borough officials and the drafters of the Model Act,[3] an object can be

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[3] Ordinance No. 982 was enacted, with certain exceptions in accordance with the Model Drug Paraphernalia Act drafted by the United States Department of Justice. The Comments to the Model Act seem to indicate that the intent of remote parties does not affect the definition of drug paraphernalia.

> "To insure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge of criminal intent of the person in control of an object a key element of the definition . . . [W]hen an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the article is subject to control. . ." MDPA Comments, p. 6.

This interpretation was adopted by several of the District Courts upholding versions of the Model Act. See Middle Atlantic Trade Accessories Trade Association, supra; Record Revolution No. 6, Inc. v. City of Parma,

classified as drug paraphernalia simply because a remote designer intended that it be used with drugs, or because a third party adapted an object to be used with drugs. Thus one of the saving factors of those ordinances that have been upheld, that the definition of drug paraphernalia includes a requirement of intent of the person charged under the Ordinance, simply is not true when the term "designed for use" is included.

The second problem is that the term "designed for use" is so vague that the range of objects that can be construed to be drug paraphernalia is simply unlimited. The Ordinance does not attempt to describe what design characteristics distinguish the lawful and unlawful uses of the objects in question.[4] In addition, as noted above, the term designed can mean the purpose for which an object was manufactured, the manner in which the object was adapted, or the intent with which the object is possessed. In *Indiana Chapter, NORML* v. *Sendak*, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) the District Court similarly found the term "designed for use" to be unconstitutionally vague. As the Court said:

> ". . . [T]he term 'designed' could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a make-

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[3] (Continued)
492 F. Supp. 1157 (N.D. Ohio, 1980), rev'd and remanded, Civ. No. 80-3308 (6th Cir. Cir., December 8, 1980).
It is our opinion today that the phrase "designed for use" allows the criminal intent of remote persons to determine whether an object is drug paraphernalia, and the comment noted above is not supported by a fair reading of the Act.

[4] While certain witnesses at the hearing held on October 29, 1980 attempted to describe those physical characteristics which would make an object "designed for use", such as the size of the bowl, and the presence of screens, the Act itself can provide no definitive properties which necessarily render an object "designed for use."

> shift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition 'designed for drug use' gives no hint to those attempting to comply with [the ordinance] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not." Id., slip op. at 12-13.

Thus the definition of drug paraphernalia, being limited neither by the intent of the person charged, nor by any objective standards, is unreasonably vague.

The second reason for declaring the Ordinance unconstitutionally vague is the difficulty we have in applying the principles of *Screws* v. *United States*[5] and *Boyce Motor Lines* v. *United States*[6] to the present issue. *Screws* and *Boyce* narrowly applied the doctrine that specific intent *can* cure a statute of a vagueness problem. But as the Parma court explained, "the Supreme Court has never . . . held that the imposition of a scienter element upon a statute necessarily renders the statute's prohibitions sufficiently precise to withstand a vagueness challenge." Id., slip. op., at 33. As Justice Jackson argues in his dissents in *Screws* and *Boyce*, it is impossible for one to intend to violate a law when he cannot understand the meaning of that law.[7] Indeed we are per-

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[5] 325 U.S. 91 (1945)

[6] 342 U.S. 337 (1952)

[7] Note also the following commentary on Justice Jackson's dissent in Boyce:

> "But as Justice Jackson correctly pointed out in his dissent, scienter—at least as it has been traditionally defined—cannot cure vagueness in a statute or regulation. One 'knowingly' commits an offense when he knows that his acts will bring about certain results (those defined in the statute in question), and whether he knows that deliberately causing such results is proscribed by statute is immaterial. Because it is knowledge of the existence or meaning

suaded by Plaintiff's argument that if all vague laws can be cured by an intent requirement, no criminal statute which requires a knowing or purposeful violation would ever be considered vague. In the present action, considering the lack of any standards defining "drug paraphernalia", we would be reluctant to proclaim that the intent requirement for a violation of the Ordinance cures the law of its vagueness.

Our next problem with Ordinance No. 982 is that it fails to avoid the danger of discriminatory enforcement. As the Court of Appeals for the Sixth Circuit noted, "Because the [ordinance] would permit at least the arrest and prosecution of persons by police and prosecutors who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance, the definition of drug paraphernalia is vague and overbroad." *Record Revolution*, slip op. at 27.

It has been argued that the chances of selective enforcement are lessened by the criteria delineated in Section 2(B) of the Ordinance. Among the criteria established for determining intent are:

(1) Statements made by the owner or anyone in control of an object concerning its use;

(9) National or local advertising concerning its use;

(10) The manner in which an object is displayed for sale;

(11) Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(12) The existence and scope of legitimate uses for the object in the community.

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[7] (Continued)

of the criminal law which is relevant, it seems clear that uncertain language in a statute is not clarified by the addition of a scienter element." Wayne LaFave and Austin Scott, Treatise on Criminal Law (1972), p. 36.

The difficulty with these standards is that they do not take discretion away from police, magistrates and judges who are to administer the act. In fact, they simply add to the subjective nature of the decision to enforce the statute. They give full leeway to the enforcing officer to determine what statements indicate an intent to use an object with drugs, what manner of advertising and what manner of displaying connote the requisite intent. For instance, in number 11, what ratio are they talking about, 2-1, 3-1, 100-1? And what difference would that make? These standards encourage speculation by the officer enforcing the statute, and in fact they fail to add any objectivity to the statute. Thus a Defendant would stand a good chance of being arrested and convicted on the basis of intent of remote parties and the subjective judgment of enforcing officers, judges, and juries. A law so constructed fails to meet the constitutional standard of due process.

Plaintiffs also challenge Section 3(D) of the Ordinance, which prohibits any advertising with knowledge that the purpose of the advertisement, in whole or in part, "is to promote the sale of objects designed or intended for use as drug paraphernalia." The United States Supreme Court has recently described the protection which the Constitution extends to commercial speech:

> "In commercial speech cases, there, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that "interest." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 48 U.S.L.W. 4783 (June 20, 1980).

The Court is in agreement with the opinion expressed by the *Parma* Court, that the Ordinance could infringe on protected speech in three ways. First, the Ordinance could be enforced against advertisers or publishers who place advertisements in printed media that circulate beyond the boundaries of State College. Second, the Ordinance could prevent the residents of State College from receiving information about the availability of items, defined as drug paraphernalia by the State College Ordinance, which are available in other cities which do not prohibit the use, sale or manufacture of those items. Third, the Ordinance's use of the words "in whole or in part" may allow the prohibition of speech discussing the reform of drug laws. Accordingly the only possible conclusion to draw is that the Ordinance at least in part tends to penalize free speech.

The Sixth Circuit Court of Appeals in *Parma* was faced with the identical problem that we now face, whether the broad prohibition is necessary to serve the interest of the Borough in protecting its citizens. The *Parma* Court held, and we agree, that the interest of the Borough is limited to regulating behavior within its own municipal boundaries. "Their legitimate interest does not include regulating the information heard or read by their citizens about the availability of legal 'drug paraphernalia' in other locales." *Parma*, slip op. at 39; see *Bigelow* v. *Virginia*, 421 U.S. 809, 827 (1975). Therefore in addressing the standards set forth in *Central Hudson Gas & Electric Corp.*, supra, we find that the regulation is more extensive than is necessary to protect the interest of the drafters of the State College Ordinance, and it therefore violates First Amendment to the Constitution.

The final questions we face today concern the manner in which the Court should most appropriately fashion relief, (1) whether the Court must declare the entire ordinance unconstitutional, and (2) whether injunctive relief is an appropriate remedy.

Section 6 of the State College Ordinance provides that "if any provision" of the Ordinance is held invalid, the invalidity does not affect other provisions of the Ordinance. The Supreme Court of the United States has long held that a provision cannot be deemed severable unless legal effect can be given the remaining provisions and it is clear that the Legislature would have intended that provision to stand. *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). It is quite clear that we cannot sever any parts of the State College Ordinance. We cannot strike a "phrase" where the Legislature allows us to strike a "provision"; and clearly the law could not stand alone without that phrase. Nor do we assume that such a deletion, along with the deletion of Section 4(D), could in itself cure the inherent vagueness difficulties presented by the Ordinance. Severability, therefore, is not an option.

Injunctive relief is appropriate in a challenge to a state ordinance where a Plaintiff has made a "clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 95 (1935); *Wooley* v. *Maynard*, 430 U.S. 705, 712 (1977). There is no question that Plaintiffs are threatened with irreparable injury if we allow this law to stand. The law creates a genuine threat of arrest, harassment and civil forfeiture, and it acts to chill the First Amendment right of free speech. Therefore the award of injunctive relief is appropriate to protect Plaintiffs' constitutional rights.[8]

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[8] During the pendency of this action, the Commonwealth of Pennsylvania amended "The Controlled Substance, Drug, Device and Cosmetic Act" to include the basic provisions of the Model Drug Paraphernalia Act. However, Section 41.1 provides that the Act shall not be deemed to preempt or supersede any local ordinance. Act of December 4, 1980, Act No. 186. Therefore the Borough Ordinance has remained in effect, and the relief awarded today is still necessary to prevent "irreparable injury" to Plaintiffs.

In conclusion, the Court holds today that State College Ordinance No. 982 is unconstitutionally vague and overbroad. In reaching this result we question not the need for legislation of this type, but the manner in which the legislation is drafted. Indeed we recognize the desire of elected officials to control the drug paraphernalia industry, an industry that not only facilitates the use of drugs, it gives drug use an almost irresistible allure. However, the Ordinance presently before the Court simply does not meet the test of precision demanded by the First and Fourteenth Amendments to the Constitution.

An Order will therefore be entered declaring State College Borough Ordinance No. 982 unconstitutional and permanently enjoining the enforcement of that Ordinance in the Borough of State College.

/s/ Richard P. Conaboy
Richard P. Conaboy
United States District Judge

Dated: January 30, 1981

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LAZY, J., LTD., A Pennsylvania Corporation, QUICK-DRAW ACCESSORIES, INC., A Pennsylvania Corporation, DAVID A. TALMAS, an individual, JAMES E. BAUER, an individual,

Plaintiffs,

vs.

THE BOROUGH OF STATE COLLEGE,

Defendant.

CIVIL ACTION NO. 80-1167

ORDER

NOW, this 30th day of January, 1981, in accordance with the attached Memorandum, IT IS ORDERED THAT:

1. Ordinance No. 982 of the Borough of State College is hereby declared unconstitutional; and
2. Officials of the Borough of State College are permanently enjoined from enforcing the provisions of that Ordinance.

/s/ Richard P. Conaboy
Richard P. Conaboy
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

RONALD E. SMITH, et al.,

Plaintiffs,

vs.

JAMES R. ROARK, et al.,

Defendants.

Civil Action No. 80-2110

MEMORANDUM ORDER

In this civil action plaintiffs challenge the constitutionality of West Virginia's recently enacted drug paraphernalia statute, W. Va. Code § 60A-4-403a.

The named plaintiffs designated in the style of this civil action as Group I Plaintiffs are engaged in the business of selling various smoking instruments, novelties and other related items of personal property. Group II Plaintiffs are employees of the Group I Plaintiffs. Group III Plaintiffs are residents of the State of West Virginia who possess smoking instruments, novelties and other related items of personal property. Defendant John D. Rockefeller, IV is the Governor of the State of West Virginia. Defendant Brigadier General H. F. Mooney, Jr. is Superintendent of the West Virginia Department of Public Safety. The remaining named defendants are prosecuting attorneys in the State of West Virginia.[1]

[1] By order entered on April 21, 1980, the court certified a plaintiff class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, consisting of the following two subclasses:

(1) All persons in the State of West Virginia who conduct, finance, manage, supervise, direct or own all or part of a business which for profit in the regular course of business or as a continuing course of conduct, manufactures, sells, stores, possesses, gives

The jurisdiction of this court is invoked under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

On March 31, 1980, the parties were heard on plaintiffs' motion for a temporary restraining order. The court granted plaintiffs' motion and a temporary restraining order was entered which enjoined defendants and the defendant class from enforcing in any manner the provisions of W. Va. Code § 60A-4-403a. By agreement of the parties, the temporary restraining order has been extended and it remains in effect as of the date of entry of this memorandum order.

Hearing on plaintiffs' motion for a preliminary injunction was, pursuant to the parties' agreement, consolidated with final hearing on the merits. The parties having further submitted memoranda of law and final arguments having been presented to the court on May 6, 1980, this matter is now before the court for decision.

I.

In response to continued public concern over the use of unlawful drugs, a number of states have in recent years enacted laws which have come to be known as drug paraphernalia statutes. Drug paraphernalia is generally regarded as encompassing devices utilized in conjunction with the unlawful use of controlled substances. A primary impetus for the enactment of drug paraphernalia laws is the belief that the unrestrained sale

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[1] (Continued)

away or furnishes various smoking instruments, novelties and other items of personal property which may fall within the statutory definition of a "drug device" found in W. Va. Code § 60A-4-403a(c);

(2) All persons in the State of West Virginia employed by members of subclass (1).

The court further certified a defendant class consisting of:

All county prosecuting attorneys in the State of West Virginia and their agents, employees and all persons acting in concert with them.

and glorification of drug paraphernalia contribute substantially to increased drug abuse.[2]

The West Virginia Legislature enacted W. Va. Code § 60A-4-403a [hereinafter, the paraphernalia statute] on February 27, 1980.[3] The major thrust of this case focuses on subsections (a), (b) and (c), providing as follows:

> (a) Any person who conducts, finances, manages, supervises, directs or owns all or part of an illegal drug paraphernalia business is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars, or confined in jail not less than six months nor more than one year, or both.
>
> (b) A person violates subsection (a) of this section when:
>
> (1) The person conducts, finances, manages, supervises, directs, or owns all or part of a business which for profit, in the regular course of business or as a continuing course of conduct, manufactures, sells, stores, possesses, gives away or furnishes objects designed to be primarily useful as drug devices.
>
> (2) The person knows or has reason to know that the design of such objects renders them primarily useful as drug devices.
>
> (c) As used in this section, "drug device" means an object usable for smoking marijuana, for smoking

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[2] *See, e.g.*, P. Bensinger, *Statement Before the House Select Committee on Narcotics Abuse and Control* (Nov. 1, 1979).

[3] The paraphernalia statute was signed into law by Governor John D. Rockefeller, IV, on March 8, 1980, and was to become effective on April 1, 1980. It appears in the W. Va. Code as part of the West Virginia Uniform Controlled Substance Act, W. Va. Code § 60A-1-101 to 6-605 (1977 Replacement Vol.).

controlled substances defined as tetrahydrocannabinols, or for ingesting or inhaling cocaine, and includes, but is not limited to:

(i) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) Water pipes;

(iii) Carburetion tubes and devices;

(iv) Smoking and carburetion masks;

(v) Roach clips; meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(vi) Chamber pipes;

(vii) Carburetor pipes;

(viii) Electric pipes;

(ix) Air-driven pipes;

(x) Chillums;

(xi) Bongs;

(xii) Ice pipes or chillers; and

(xiii) Miniature cocaine spoons, and cocaine vials.

In any prosecution under this section, the question whether an object is a drug device shall be a question of fact.[4]

The core of plaintiffs' challenge to the paraphernalia statute is whether the operative phrase "designed to be primarily useful as a drug device" found in subsections (b)(1) and (b)(2) is unduly vague and, therefore, violative of due process. Plaintiffs further question the validity of the paraphernalia statute on a variety of

[4] The remainder of § 60A-4-403a, consisting of subsections (d) through (g), is set forth in the Appendix to this opinion.

other constitutional grounds.[5] Inasmuch as the court's consideration of the void for vagueness issue is dispositive of plaintiffs' claims, it alone is addressed.

II.

As a general proposition, the due process clause of the Fifth Amendment as made applicable to the states through the Fourteenth Amendment requires that laws which proscribe conduct be drawn in sufficiently definite terms as to place persons of ordinary intelligence on notice of what conduct is proscribed. Three values have been identified as threatened by vague laws:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedom," it "operates to inhibit the exercise of [those] freedoms." Uncertain

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[5] These include the following: (1) The statute is not rationally related to a legitimate state purpose; (2) it is violative of plaintiffs' Fourth and Eighth Amendment rights; (3) it constitutes an unlawful taking in violation of the takings clause of the Fifth Amendment; (4) it is violative of the equal protection clause of the Fifth Amendment; (5) it effectuates an impermissible interference with interstate commerce in violation of the commerce clause; and (6) it violates plaintiffs' right of privacy as guaranteed by the First and Ninth Amendments.

> meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . then if the boundaries of the forbidden areas were clearly marked."

Grayned v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) [footnotes omitted].[6] In certain areas of public concern, however, it is recognized that it is inherently difficult to draft legislation in definite terms because the proscribed conduct is identical to lawful conduct in the absence of a criminal plan or motive. *See, e.g., Screws* v. *United States*, 325 U.S. 91, 103 (1944); *Danovitz* v. *United States*, 281 U.S. 389 (1930). It has, therefore, been held that a statute which proscribes conduct in unavoidably uncertain language may be rendered certain and, therefore, constitutionally sound, if the law further requires that the accused act with a specific intent to engage in the prohibited conduct. In such instances, persons whose activities are potentially abridged by the law are not in a position to assert that the law fails to adequately forewarn of the conduct prohibited under its terms. *Compare Screws* v. *United States*, *supra* at 103, *with Colautti* v. *Franklin*, 439 U.S. 379, 395 (1979).

In the case at bar, the paraphernalia statute incorporates two major elements which must exist in order for a person to be found guilty of having engaged in the conduct which is principally proscribed by its terms. *See* W. Va. Code § 60A-4-403a(b)(1)-(2). The court turns first to consider the element of the act itself and secondly to the element of knowledge.

A.

The act element of the paraphernalia statute requires that it be shown that an accused:

> [C]onducts, finances, manages, supervises, directs, or owns all or part of a business which for profit, in

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[6] *See also Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1974); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969).

> the regular course of business or as a continuing course of conduct, manufactures, sells, stores, possesses, gives away or furnishes objects designed to be primarily useful as drug devices.

W. Va. Code § 60A-4-403a(b)(1). Stated more succinctly, the act element requires that the accused be involved in a business which in some manner creates or furnishes "objects designed to be primarily useful as drug devices." A drug device is defined in subsection (c) of the statute as "an object usable for smoking marijuana, for smoking controlled substances defined as tetrahydrocannabinols, or for ingesting or inhaling cocaine, and includes, but is not limited to" thirteen objects or classes of objects which are then listed in the statute. W. Va. Code § 60A-4-403a(c). Thus, the act element of the paraphernalia statute requires, in part, that the object which is a subject of the accused's business activities be one which is not only usable for smoking marijuana or tetrahydrocannabinols or for ingesting or inhaling cocaine, but is so designed as to be primarily useful for such purposes.

The evidence offered by the parties addressed, in part, whether certain objects introduced as exhibits contained features which either standing alone or taken together would permit one to conclude that the object's design rendered it primarily useful as a drug device in contrast with its other uses. Limiting the court's inquiry for the moment to marijuana and tetrahydrocannabinols, the evidence showed that there is a virtual universe of objects which are functionally usable for smoking marijuana or tetrahydrocannabinols. The evidence further suggested that within that universe there is one class of objects which may be considered as falling within the scope of the statute's operative phrase, consisting of pipes which are designed with a small bowl and screen for the placing and burning of the smoking substance. In such instances, the smoking substances may burn in less than a minute's time. One may reasonably infer that

such a bowl is designed for use with smoking substances which have an immediate and profound effect on the smoker in contrast with the customary pipe load of ordinary tobacco which is normally consumed over a period of at least several minutes in order for the smoker to achieve the degree of satisfaction sought. Moreover, such a small bowl is by its design particularly suited for use with a costly smoking substance such as marijuana or hashish which is often consumed in small quantities. Thus, although a pipe which has a small bowl and a screen is usable for smoking tobacco or any other legal organic smoking substance, one may nevertheless conclude that by its design it is primarily useful for smoking marijuana or tetrahydrocannabinols.

Even conceding, however, that there is a class of pipes which objectively fall within the paraphernalia statute's operative phrase, the statute nevertheless fails to furnish specifications or guidelines which may be used as a measure in determining whether a given object is primarily designed to be useful as a drug device. The difficulty created by this omission is illustrated by the court's reference in the preceding paragraph to a "small bowl." That phrase is a subjective characterization which has no fixed definition inasmuch as it is a product of individual perception, experience and, perhaps, motive. The point at which a "small bowl" becomes a "normal bowl" is a shadowy one at best.[7] Moreover, the evidence suggested that there are countless objects frequently thought of as devices used for smoking marijuana or tetrahydrocannabinols, but which are just as readily adaptable and functionally suitable for normal tobacco smoking or other legal uses. For example, the rolling papers in evidence are equally usable for tobacco and marijuana smoking regardless of whether the papers are plain white or whether they are embossed with a

[7] The same conclusion is suggested in *Music Shop, Inc.* v. *City of Ferndale*, No. 79-73375 (E.D. Mich. April 9, 1980), quoted *infra* at 10.

psychedelic or irreverent print design. The roach clips in evidence are virtually identical in design to the electrical alligator clips also introduced. The hemostats introduced into evidence have obvious non-drug related uses. Even the water pipes and bongs in evidence were shown to be readily usable for smoking tobacco or legal smoking herbs.[8] Likewise, the miniature spoons, small vials and pocket mirror in evidence all have apparent non-drug related uses in addition to their usefulness as aids in ingesting or inhaling cocaine.[9]

The chief mischief arising from the paraphernalia statute is found in the act element which, while focusing upon an object's primary design, fails to provide specifications or guidelines which may serve as a measure of primary design. Equally applicable here is the conclusion reached in *Music Shop, Inc.* v. *City of Ferndale*, No. 79-73375 (E.D. Mich. April 9, 1980), wherein the court observed with reference to another "primarily designed" paraphernalia statute that:

> Certainly no fixed extrinsic reference point appears to exist which could be relied upon to alert the potential retailer of ordinary intelligence and prudence, or provide a sliding scale for measurement of primary and secondary design intent.

Id. Thus, it is exceedingly difficult, if not impossible, to determine whether objects commonly considered to be used in conjunction with marijuana, tetrahydrocannabinols and cocaine fall within or without the statute's proscription based, as it is, on primary design. As a result, there is a substantial gray area in which it is simply not possible to apply the statute with adequate certainty to the morass of objects subject to its terms.

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[8] *See also Geiger* v. *City of Eagan*, No. 79-1831 (8th Cir., March 19, 1980).

[9] *See also Indiana Chapter, National Organization for the Reform of Marijuana Laws, Inc.* v. *Sendak*, No. Th 75-142-C (S.D. Ind., Feb. 14, 1980) (Final order) (Paper clip, the bar, hand mirror, spoon and aluminum foil recognized as objects useable as drug devices).

B.

In summary, it is clear from the evidence in this case that objects falling within the thirteen categories in the statute are as usable for smoking tobacco as for marijuana or hashish and are in reality used for both legitimate purposes.[10] Similarly, a cocaine spoon is equally usable for snorting snuff or spreading salt. And a vial, whether large or small, is but a vial. So, too, with numerous other items in evidence which are not specifically named among the thirteen categories, including cigarette rolling papers, hemostats and mirrors, all of which have long enjoyed respectability even though each may be employed in aid of an illicit drug use.

From the testimony of law enforcement officers appearing for both sides in this case, it is apparent that one's view as to the primary design of a given smoking device is frequently influenced by subjective matter such as the type of store in which the device is sold, the age of the buyer, and the use to which the object is being put. That is not to say that water pipes are used with the same frequency for smoking regular tobacco as for marijuana or hashish. Nor is it to suggest that an object can never be said to have been primarily designed for use as a drug device in the smoking of marijuana or hashish. Rather, as was conceded in argument, it is to hold that the primary design test is at best a slippery standard. In its application to most smoking devices, one is left to speculate as to whether the object's primary design or purpose is licit or illicit. The statute itself is devoid of any standards by which one might assess or measure a given object in order to determine the purpose for which it is primarily designed. Absent statutory standards the

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[10] Appearing as one of the thirteen categories is the strang sounding term "chillums." Webster's defines it as "The part of a water pipe that contains the substance (as tobacco or hashish) which is smoked." *Webster's New Collegiate Dictionary* 193 (rev. perm. ed. 1977)

primary design of the bulk of the smoking aids and devices embraced by the statute is generally not discernible with sufficient certainty as to enable one of ordinary intelligence to know whether a given item is primarily designed for use as a drug device. The citizen, then, is left at his peril to judge for himself. The law enforcement officer is encouraged, at his whim, to level arbitrary and discriminatory charges. The judge and jury are left to speculate in similar fashion.

C.

Although, as previously noted, a statute's incorporation of a *mens rea* element requiring a specific intent to perform the proscribed conduct can sometimes render certain an otherwise vague act element,[11] the knowledge element in the paraphernalia statute here is of no significant aid.

Subsection (b)(2) of the parapheralia statute requires that:

> The person knows or has reason to know that the design of such objects renders them primarily useful as drug devices.

W. Va. Code § 60A-4-403a(b)(2). It is observed that subsection (b)(2) is neither a specific intent nor even an actual knowledge requirement in that it permits a showing of constructive knowledge based upon proof of a "reason to know" to satisfyy the *mens rea* element. Assuming for the moment, however, that the phrase "or has reason to know" is deleted from subsection (b)(2),[12] the remaining actual knowledge requirement does not cure the fundamental vagueness of the statute inasmuch as the concept of primary design, for reasons just noted,

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[11] For a general discussion of *mens rea* see *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436-38 (1976).

[12] *See Record Revolution No. 6, Inc.* v. *City of Parma, infra* at 13.

is itself so vague as to be unworkable when applied to the bulk of the objects at issue under the statute.

D.

A further observation. During the course of the proceedings in this civil action, the paraphernalia statute was referred to on occasion by witnesses and counsel as based upon or otherwise modeled after the Model Drug Paraphernalia Act recently promulgated by the Drug Enforcement Administration of the United States Department of Justice. With the bare exception of the list of thirteen objects or classes of objects found in subsection (c) of the statute, however, the statute and Act bear virtually no resemblance. In *Record Revolution No. 6, Inc.* v. *City of Parma,* No. C80-38 (N.D. Ohio April 14, 1980), the portion of the Model Act, as adopted by the City of Parma, which prohibits the sale of drug paraphernalia was construed as being comprised of the following three elements:

(1) that the defendant delivered (sold) a piece of equipment, a product or material;

(2) that the defendant delivered (sold) the item (a) intending it for use with illegal narcotics, (b) having designed it himself for use with illegal narcotics, or (c) having intentionally used it himself with illegal narcotics; and

(3) that the defendant delivered (sold) the item with knowledge that it would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body an illegal controlled substance.

Id. at 16.

As is apparent, the Model Act as construed in *City of Parma* does not focus upon an object's primary design and the accused's knowledge of it. Instead, the *intent* of the accused with respect to an object delivered by him, coupled with his knowledge of the improper drug use

to be made of it, serve as the operative elements giving rise to the conduct proscribed by the Model Act.[13]

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[13] The court notes parenthetically that in *City of Parma* the court undertook a substantial construction of the Model Act in order to remedy constitutional deficiencies which the court perceived on the face of the Act. The deficiency which is, perhaps, most pertinent to the case at bar was that the Act makes it unlawful to distribute drug paraphernalia "knowing, or *under circumstances where one reasonably should know*" that it would be used in conjunction with a controlled substance. *Model Drug Paraphernalia Act* Art. II, § B (Emphasis added). The court stated that:

> Defining the offense of knowingly distributing drug paraphernalia in terms of the weakness of an individuals's ability to perceive rather than his criminal intent provides insufficient guidance to the distributors covered by this subsection and to those persons charged with the responsibility of enforcing it. The court further finds that the constructive knowledge standard is distinct from the other portions of this subsection and therefore severable from it pursuant to section 620.04(g), the severability clause.

Record Revolution No. 6, Inc. v. *City of Parma, supra* at 15-16. It should further be observed, however, that the 'knowing" element of the Model Act is dissimilar to the "knowing" element of the West Virginia paraphernalia statute in that the Model Act requires that the accused have knowledge of the object's end use whereas the paraphernalia statute requires that the accused have knowledge of the object's primary design.

A municipal drug paraphernalia ordinance which prohibited the sale of paraphernalia if the seller "has reasonable cause to believe that the product sold . . . will be used in conjunction with any controlled dangerous substance . . ." was declared void for vagueness in *Knoedler* v. *Roxbury Township*, No. 80-228 (D.N.J., March 3, 1980). The court held that the ordinance failed to provide sellers with guidance as to what factors could be considered in ascertaining the purchaser's "intent" in the absence of an admission by the purchaser, nor were such factors otherwise ascertainable by the court.

This construction of the Model Act is, therefore. similar in methodology to that employed in the National Prohibition Act cases in which the provisions of the Act in issue proscribed the sale or possession of otherwise innocuous items for the *intended use* of producing intoxicating lifuor. *See, e.g., Danovitz* v. *United States,* 281 U.S. 389 (1930); *Israel* v. *United States,* 63 F.2d 345 (3rd Cir. 1933); *Jones* v. *United States,* 11 F.2d 98 (4th Cir. 1926); *Weinstein* v. *United States,* 293 F. 388 (1st Cir. 1923).

In contrast, the paraphernalia statute focuses upon the accused's knowledge of an object's primary design, an elusive concept frequently impossible of application when related to the items falling within the ambit of the statute.

III.

The regulation of the sale of drug related devices is a matter well within the prerogative of the State. Society's concern with the increased incidence of drug abuse, and especially the serious threat which misuse of controlled substances poses to the young, is amply justified. Nevertheless, in legislating to meet this ominous menace, statutes must be drawn in keeping with constitutional standard of due process.

The imprecise means employed in the paraphernalia statute at issue create a constitutionally impermissible area of uncertainty which threatens to deter lawful conduct and promote arbitrary enforcement. Inasmuch as the paraphernalia statute fails to provide fair warning of what conduct is proscribed to those persons potentially affected by its terms and further fails to provide law enforcement officials with guidelines by which to enforce its sanctions, the court holds that the criminal offense delineated in W. Va. Code § 60A-4-403a(a)-(c) is unduly vague and void as violative of the requirements of due process. Since the remaining provisions of the paraphernalia statute, W. Va. Code § 60A-4-403a(d)-(g), are ancillary to and contingent upon the

statute's principal offense stated in subsections (a), (b) and (c), they too are unduly vague and void as violative of the requirements of due process.

Accordingly, it is hereby ORDERED and DECLARED pursuant to 28 U.S.C. § 2201 that W. Va. Code § 60A-4-403a(a)-(g) is void for vagueness and, therefore, violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

It is hereby forther ORDERED that defendants Mooney, Roark, Cummings, Knight and the defendant class shall be, and so hereby are, permanently enjoined from enforcing in any manner W. Va. Code § 60A-4-403(a)-(g).

The court's final disposition of this matter having rendered unnecessary plaintiffs' motion for a preliminary injunction, it is hereby further ORDERED that plaintiffs' motion for a preliminary injunction is denied as being moot.

The Clerk is directed to strike this civil action from the docket of the court and to forward certified copies of this order to all counsel of record herein.

ENTER: May 13, 1980

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
United States District Judge

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION MIDDLESEX COUNTY
DOCKET NO. C-2198-80

THE TOWN TOBACCONIST, et als.,

Plaintiffs,

v.

JOHN J. DEGNAN, Attorney General for the State of New Jersey,

Defendant.

Decided: March 12, 1981

COHEN, J. S.C.

This action was brought by a group of retailers of what they call novelty items for the purpose of challenging the constitutionality of Chapter 133 of the laws of 1980, an act regulating the manufacture, sale, possession, use and advertising of drug paraphernalia. They assert that some of their merchandise and sales activity may fall within the enforcement ambit of the act. They have a real and substantial fear of enforcement which gives them standing to bring this matter before the Court. They argue that major portions of the act are unconstitutional and ask for a permanent injunction against enforcement of those portions. I restrained enforcement of substantial parts of the new law and accelerated the matter for final hearing.

The plaintiffs do not say they are users of drug paraphernalia or possessors with intent to use drug paraphernalia in connection with controlled dangerous substances. They do not purport to represent such users or possessors or to occupy a position from which they can assert the rights of such users or possessors. Except as the determination of the rights of these plaintiffs may unavoidably spill over into other areas, therefore, the rights of such users and possessors are not before the Court. The plaintiffs also disclaim any interest in the enforcement of prohibitions against sale or possession of hypodermic syringes.

Drug paraphernalia is commonly and imprecisely thought of as items of equipment used in the storage, processing and use of controlled dangerous substances. The challenged law supplements the 1970 Controlled Dangerous Substances Act. It is patterned after a model act designed by the federal Drug Enforcement Administration. Variations of the model act have been adopted in a number of states and municipalities throughout the country. There has been a wide range of attacks on their constitutional validity and a variety of judicial responses.

The heart of our statute is the definition of drug paraphernalia. It is detailed and complex, probably because it tries to cover items of many different kinds. It attempts to treat items of but one use, and that one connected to CDS. It also reaches items usable and often used for such purposes but having other and innocent uses. Finally, it reaches items of commonly legitimate use that can also be employed in connection with CDS. The plaintiffs' major attack asserts that the definition is impermissibly vague and fatally overbroad. They make many other challenges to other elements of the statute. However, it makes sense first to examine what the plaintiff's argue is a central flaw in the statutory structure. If it is a defect as major as the plaintiffs suggest, it may require condemnation of the whole structure, without an inspection of the other claimed faults.

Before examining the definitional language, it is appropriate to ask whether the guidelines prepared by the attorney general have any role in such an examination. For a number of reasons, they do not. First, they do not purport to produce any relevant variance between the statutory definitional language as it is written and as the attorney general will permit it to be employed in enforcement activity. Second, even if the guidelines should be read to ameliorate any constitutional infirmities, they are neither a permanent part of the law nor an enforcement limitation whose continued existence manufacturers, wholesalers and retailers can rely upon

in making business commitments. Third, some parts of the guidelines may create their own equal protection problems, not contemplated by the legislature, which I would not readily engraft onto the law as written. The attorney general is chief law enforcement officer of the state and, within limits, he may regulate enforcement efforts throughout the state. And it is entirely appropriate that he should define, coordinate and control the enforcement activities of his subordinates. His reins on the activity of police officers and prosecutors can not, however, be taken to correct constitutional infirmities in statutory language.

An examination of the statutory definition must be made with the view toward the issue of vagueness and the additional issue of overbreadth. A statute may be so vague as to deprive affected persons of the due process of the law. A penal statute must afford persons of common intelligence fair notice of what the law requires of them and thus enable them to avoid prohibited conduct. It must provide explicit standards for those who enforce it. It must not delegate decisions on basic policy matters to enforcers and jurors on an *ad hoc* basis and thus create dangers of arbitrary and discriminatory application. *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972).

Even a perfectly clear statute may be unconstitutionally overbroad. If the targets of appropriate enforcement are surrounded by constitutionally protected areas, a law that attacks the protected areas in its efforts to reach its legitimate targets can be struck down as overbroad. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

The act defines drug paraphernalia as follows:

> As used in this act, "drug paraphernalia" means all equipment, products and materials of any kind which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, pro-

cessing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling, or otherwise introducing into the human body a controlled dangerous substance in violation of the provisions of the act to which this act is a supplement. It shall include, but not be limited to: a. kits used or intended for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled dangerous substances or from which a controlled dangerous substance can be derived; b. kits used or intended for use in manufacturing, compounding, converting, producing, processing, or preparing controlled dangerous substances; c. isomerization devices used or intended for use in increasing the potency of any species of plant which is a controlled dangerous substance; d. testing equipment used or intended for use identifying, or in analyzing the strength, effectiveness or parity of controlled dangerous substances; e. scales and balances used or intended for use in weighing or measuring controlled dangerous substances; f. diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used or intended for use in cutting controlled dangerous substances; g. separation gins and sifters used or intended for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana; h. blenders, bowls, containers, spoons and mixing devices used or intended for use in compounding controlled dangerous substances; i. capsules, balloons, envelopes and other containers used or intended for use in packaging small quantities of controlled dangerous substances; j. containers and other objects used or intended for use in storing or concealing controlled dangerous substances; k. objects used or intended for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as (1) metal, wooden, acrylic, glass, stone, plastic, or cer-

amic pipes with or without screens, permanent screens, hashish beads, or punctured metal bowls; (2) water pipes; (3) carbuertion tubes and devices; (4) smoking and carburetion masks; (5) roach clips, meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand; (6) miniature cocaine spoons, and cocaine vials; (7) chamber pipes; (8) carburetor pipes; (9) electric pipes; (10) air driven pipes; (11) chillums; (12) bongs; and (13) ice pipes or chillers.

In determining whether or not an object is drug paraphernalia, the trier of fact, in addition to or as part of the proofs, may consider the following factors: a. statements by an ower or by anyone in control of the object concerning its use; b. the proximity of the object to illegally possessed controlled dangerous substances; c. the existence of any residue of illegally possessed controlled dangerous substances on the object; d. direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows intend to use the object to facilitate a violation of this act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use as drug paraphernalia; e. instructions, oral or written, provided with the object concerning its use; f. descriptive materials accompanying the object which explain or depict its use: g. national or local advertising whose purpose the person knows or should know is to promote the sale of objects intended for use as drug paraphernalia; h. the manner in which the object is displayed for sale; i. the existence and scope of legitimate uses for the object in the community; and j. expert testimony concerning its use.

The first part of the definition says that it covers all materials or things "which are used or intended for

use" in various stages of growing, processing, storing or using unlawful CDS. There follows a long list of included examples. Description of each of the eleven examples or classes of examples includes the wording "used or intended for use" for a CDS-related purpose. The eleventh class, objects used or intended for use with marijuana, hashish and cocaine, is itself followed by thirteen examples. Since some of them are plainly multi-use items, the "used or intended for use" language that introduces them must be read to further qualify and define them. Thus, every material or thing must, in order to be drug paraphernalia, be used or intended for use in connection with unlawful CDS.

Objects are not used or intended for use in an unpopulated vacuum. The use or intention for use envisioned by the statute must be by someone. It is not facially clear whether "used" means frequently used or used by someone in particular against whom enforcement may be aimed and whether "intended for use" means intended by its manufacturer, its seller or its ultimate possessor for use. It is clear that it does not mean "designed for use". The model act created by D.E.A. employed the phrase, "used, intended for use, or designed for use". The omission in our act of that language may mean that it is insufficient that the original designer or maker of the item contemplated a particular use for the item.

It is not the seller's intent that is at issue. If it were, then an item would not be drug paraphernalia unless the retailer intended that his customer use it unlawfully. It is plain that the retailer's intent is to sell the item. The regulation of seller's conduct contained in Section 3 requires only that he "know" the item will be used by his customer with CDS. The legislature would not purposely have added so subtly and indirectly the greater requirement that he intended his customer to make such use.

After the list of examples, the act offers a list of ten factors which the trier of fact may consider as part of

the proofs or, startlingly, in addition thereto. The precise relevance of the listed factors is not indicated. In some cases it is not readily apparent.

The phrase "used or intended for use", that appears a dozen times renders the definition of drug paraphernalia unlawfully vague. It is impossible for any retailer to know whose use or whose intention he must be aware of. If it is 'frequent" use, he can not tell how frequent it must be, or among what groups of people. If it is the customer's intention, then, before the customer arrives, the retailer can not tell if he is unlawfully stocking drug paraphernalia. The prior act of putting the item on his shelves would become unlawful only later, after the intentions of the yet unidentified customer are revealed.

Section 3 of the act outlaws a retailer's possessing drug paraphernalia with intent to sell it, "knowing that it will be used" in connection with unlawful CDS. It is impossible to determine the lawfulness of the retailer's possession of multi-use items based on the prediction how many of tomorrow's customers will take items home and use them unlawfully. A retailer therefore can not decide whether to stock an item on the basis of its lawfulness, because its status as drug paraphernalia is not determinable until someone comes in to buy it.

The state argues that possession of items is often rendered unlawful by its connection with the intent of another. There are such laws. N.J.S.A. 2C:5-5 penalizes any person who possesses any tool "adapted, designed or commonly used" for committing forcible entries if he knows it is so adapted, designed or commonly used and has a purpose to provide it to some person who he knows has a purpose to so use it. N.J.S.A. 2C:29-3 penalizes a person who, with purpose to hinder the apprehension of another for an offense, provides a means of avoiding discovery or apprehension. N.J.S.A. 2C:37-7 penalizes a person who sells a gambling device, believing it is to be used in the advancement of unlawful gambling

activity. A gambling device is paraphernalia which is "used or usable in the playing phases of any gambling activity". N.J.S.A. 2C:37-1(e).

These statutes are different. In two instances, only knowing sale or provision for unlawful purposes is prohibited. Possession is not mentioned. In the third, the possessor of burglary tools is penalized for preparing to provide the means for a serious crime against a third person. In none of them does the statute attempt to prohibit possession of an item that has multiple uses solely on the basis of its later intended use by an unidentified person or group of persons.

An example may help. One of the statutory examples of drug paraphernalia is "containers . . . used or intended for use in storing . . . controlled dangerous substances". Any container of any shape or material or almost any size is included, if it is used or intended for storing CDS. Plastic sandwich bags may be and, I am told, frequently are so used. May a retailer other than a food store safely stock them? They are not designed for unlawful use or, in all likelihood, principally so used. But, a retailer whose customers are of a certain age or who stocks the trappings of youth may not confidently stock an item routinely sold in the supermarket down the street. There are probably other multipurpose items whose main use is in connection with CDS, and whose display and sale as multipurpose items may be more cynical. It may not be realistic to repeat loftily, as the plaintiff's witness did here, that one does not speculate what one's customers do with their purchases. That expressed an attitude best accompanied by a knowing wink. But the statutory definition does not distinguish between the ash tray, the baggie and the cigarettte rolling paper, all true multipurpose items, and others whose market is more narrowly focussed.

I must declare the definition unlawfully vague and, with it, the sections of the statute governing the plain-

tiffs' conduct, namely Sections 3, 4 and 5. The prohibitions of Section 3 are not saved by any requirement of specific intent. Intent to do what the law prohibits is insufficient if the central definition of the offending matter is unconstitutionally vague. *Screws* v. *United States*, 325 U.S. 91 (1945); *Boyce Motor Lines* v. *United States*, 342 U.S. 337 (1952). Section 6 is unaffected by my ruling. Section 2 may or may not be affected. The question is not before me, but it is possible that the prohibition of use or possession of drug paraphernalia with intent to use it may survive Since the statutory definition can be read to focus on the use or intent of the very person to be charged under Section 2, his conduct may be lawfully regulated. That is not the plaintiffs' problem. It will have to await decision elsewhere.

I have reached my decision reluctantly. I have more than merely institutional sympathy for the legislature's legitimate desire to control unlawful CDS use by preventing casual, and open and ostensibly acceptable sale of its trappings. If the statutory definition were amenable to a saving construction, I would have adopted it. However, sympathy for the legislature's purpose and distaste for the trade it seeks to control can not validate an invalid penal statute.

The model act prepared by the DEA has created frequent constitutional controversy wherever enacted in whole or part. Various elements or all of it have been invalidated in *Record Revolution No. 6* v. *Parma*, Nos. 80-3308, 3352, 3353, (6 Cir. December 8, 1980); *Lazy J. Ltd.* v. *Borough of State College*, No. 80-1167 (M.D. Pa. 1981); *Norml* v. *Sendak*, No. TH 75-142-C (S.D. Ind. February 4, 1980); *Record Head, Inc.* v. *Olson*, 476 F. Supp. 366 (D.N.D. 1979); *Geiger* v. *City of Eigen*, 618 F.2d 26 (8 Cir. 1980); *Knoedler* v. *Roxbury Twp.*, 485 F. Supp. 990 (D.N.J. 1980); *Weiler* v. *Carpenter*, No. 80-637 J.B. (D.N.M. 1981); *Record Museum* v. *Lawrence Township*, 481 F. Supp. 768 (D.N.J. 1979). See, also, *High Ol' Times* v. *Busbee*, 456 F. Supp. 1035 (N.D. Ga.

1978); *Bambu Sales, Inc.* v. *Gibson,* 474 F. Supp. 1306 (D.N.J. 1979). These courts invalidated all or parts of the act and its progeny for various defects not all of which may inject our version. Running through their opinions, almost without exception, is the same feeling that business people of common intelligence can not deal sensibly with the act's definition or its requirement that they act on the invalid basis of a view of someone else's intent. They share this Court's reluctant conclusion that the constitution does not permit such vagueness and indirection in criminal laws. Compare *World Imports, Inc.* v. *Woodbridge Twp.,* 493 F. Supp. 428 (D.N.J. 1980); *Tobacco Road* v. *City of Nevi,* 490 F. Supp. 537 (E.D. Mich. 1979).

I share the belief expressed by Judge Sarokin in *Knoedler* v. *Roxbury Twp., Supra,* that a law barring sales of specified paraphernalia, with the purpose that the customer unlawfully use it with CDS, might pass constitutional muster.

Such formulation might avoid focusing on the seller's evaluation of his purchaser's intent. See *Knoedler* v. *Roxbury Twp., Supra.* The legislature might also consider whether some paraphernalia is used unlawfully with such frequency as to justify prohibition of commerce in it on a *per se* basis.

Plaintiffs will submit an order for judgment in accordance with this opinion and on notice to the Attorney General.

DISTRICT COURT,

CITY AND COUNTY OF DENVER, COLORADO
Case No. 81CV6293, Courtroom 21

REPORTER'S TRANSCRIPT—COURT RULING

DENNIS WAKABAYASHI, et al.,

Plaintiff,

vs.

DALE TOOLEY, et al.,

Defendant.

The hearing on preliminary injunction further commenced on Tuesday, August 18, 1981, before the HONORABLE ALVIN D. LICHTENSTEIN, Judge of the District Court, Second Judicial District.

FOR THE PLAINTIFF:
ARTHUR M. SCHWARTZ

FOR THE DEFENDANT:
DALE TOOLEY, District Attorney
By: SUSAN TROUT
GUY TILL
JACK OLSEN
Deputy District Attorneys

Denver, Colorado

Tuesday, August 18, 1981

• • • •

THE COURT: The Court is prepared to rule. Based on the testimony that I heard in this case, which would indicate to the Court a real question on the part of persons engaged in the sale of novelties, commonly referred to, I assume as "head shops", there apparently is a great deal of concern as to what constitutes or does not constitute a violation of 12-22-501, and subsequent sections relating to the control of drug paraphernalia.

The Court finds as a finding of fact that based on the testimony, there is a conscientious effort of not only the

owners themselves to make an accurate determination of what would constitute a violation of the law, and that also based on the evidence, physical evidence and testimony, apparently a law enforcement agency and prosecutors have attempted to enlighten the public in general; in certain segments of the public in particular, proprietors of novelty and head shops, as to what does nor does not constitute a violation of the law.

Taking into consideration all of the evidence before the Court, and have read thoroughly the fine briefs submitted by both parties in this case, and having done some reading and research on its own, the Court must address itself to the matter specifically before this Court on this day; that is, whether or not this Court which originally was requested to take this case for the purpose of a temporary restraining order, and by agreement of counsel, and with the approval of the Chief Judge, the jurisdiction of this Court was expected to ruling on a matter of preliminary injunction.

The elements that must be shown by a party seeking a preliminary injunction is one, that an irreparable harm would result were not the preliminary injunction granted; secondly, they must show a likelihood of prevailing on the merits, and in light of the fact that this is a utilization in part of the police powers of the State in controlling drug and drug trafficking as its ultimate goal, it is a matter of public interest, and there, last but not least, must be a balancing of equities between the parties, so that the Court must determine whether or not the status quo situation would result in the better administration of justice.

The evidence in this case has indicated that in an enforcement of the drug paraphernalia statute, arrests have already occurred within the City and County of Denver pursuant to the drug paraphernalia law, and I might state that inherent in the laws of our State is also the amendment adding drug paraphernalia to other itemized activities such as gambling, prostitution, etc.,

which could allow for the putting into effect of the public nuisance statute, which would, in effect, terminate the operation of the "public nuisance", and allow for the confiscation of certain properties.

The Courts finds as to the element of irreparable harm the past arrests and indication of possible future arrests, and the possible confiscation of property, and closing of businesses, could result in an irreparable harm, were not the enforcement of this statute at least preliminarily enjoined.

The Court must take judicial notice of the fact that one of the definite assets of an ongoing buisness is that it's "ongoing". And many business transactions result in the sale of "goodwill" because a business has been in existence for a period of time and is operating on a continuous basis. Closing down of all or any part of a business certainly would be a depivation of right to make a living, and as such could well cause an irreparable harm which could not be rectified solely by something like damages in the future because they are rather immeasurable in some, and how long it would take to regain momentum once it has been closed might result in the possibility if not probability of a business would not be able to continue at all, were on the merits this statute found to be unconstitutional.

Addressing another element, that of a matter of public interest, the Court recognizes very, very definitely the need to control drug trafficking thorughout the State, and in this case the injunction and suit on the merits is directed toward the Second Judicial District, the City and County of Denver, being a large metropolitan area, there is no question that drug trafficking has gotten out of line. It is a basis for many, many more serious felony-type crimes that are the direct result of drug trafficking and certainly this is a matter of public interest, and certainly subject to the police control powers of the State.

The Court must consider in determining whether or not to grant this preliminary injunction along with the other elements as to whether or not there is a likelihood of prevailing on the merits. Parenthetically, I would state that it makes somewhat easier a task of a trial judge in making a determination of likelihood of success, as opposed to that judge which must make the final determination of whether or not a statute is constitutional or not.

One of the main grounds raised by the plaintiff in this case is that this statute must of necessity fall because of vagueness. In the case of *People* v. *Heckard*, at 431 P.2d 1014, a 1967 case, our Supreme Court stated as follows:

> "Inherent in due process is the concept of fairness which requires the legislature to frame criminal statutes with sufficient clarity so as to inform persons subject to such laws of the standards of conduct imposed, i.e., give a fair warning of the forbidden acts.", citing *Cline* v. *Frink Dairy Company*, 274 U.S. 455, and *Memorial Trusts* v. *Beery*, 144 Colo. 448.

In the *Heckard* case, the Court goes on to say,

> "And, such laws must be drafted so that innocent persons who desire to comply with them will be able to do so. Of course, definiteness must also provide the police and prosecution with clearly-defined standards. These in turn serve to lessen the effect of personal judgment and discrimination upon enforcement processes. Obviously such statutes must provide standards sufficiently precise to inform a court and jury whether a crime has been committed and proved. When there is no reasonably ascertainable standard of guilt, the criminal process may lie open to whim and caprice which is abhorrent to our system of fair play and justice."

In reference to this case, and going back to what our Supreme Court has said, that the definiteness must provide police and prosecution with clearly-defined statutes, or standards, I note that the District Attorney's office in Denver in one of the Exhibits submitted to the Court and admitted, has sent out to all of the—I shouldn't say "all"—to some of the places of business which in his opinion might well be in violation of a statute, what in his opinion would enable them to continue in business by enumerating what, in his opinion, would be constitutionally and statutorily legal items for sale.

The Court notes that in these guidelines submitted to the operators of the novelty shops or head shops, is listed one item which in the opinion of Mr. Tooley, and it may well be in the opinion of most persons, an item which would definitely fall under, in his opinion, the drug paraphernalia statute. That, I believe, was what he referred to as a "coke kit", which comprised of a mirror, razor blade, and I believe a straw, and if I'm not mistaken it might have said something about "coke" on it.

Pointing out in the brief and also noting what in the guidelines that these items sold separately would not be a violation of the statute, but combined they would give notice to anyone that such an item was drug paraphernalia.

Court notes that this is really the only specific item that the Court recalls appearing in the guidelines which is set forth as drug paraphernalia, and the logic of the conclusion on the part of Mr. Tooley may be well shared by all courts throughout the State, all operators of novelty shops, because obviously such a combination—there would be no question as to whether or not it was primarily designed and intended for use as drug paraphernalia.

However, from the testimony that the Court heard from the witness stand, there are many, many, many items the use of which could be "primarily" tobacco,

smoking, various other means of smoking herbs which are not proscribed by statute, utilization of clips, electrical clips for holding—obviously intended originally for electrical wires, but could be used in clipping feathers to hat bands, various other utilization it would be difficult for a person other than subjectively to make a determination that any particular item fell under the proscription of this particular statute.

The statute itself in 12-22-503, states, "In determining whether an object is drug paraphernalia, a Court in its discretion may consider in addition to all other relevant factors the following." And then lists eleven criteria. The Court notes as pointed out in the briefs, that the model act allowed for these criteria or definitions to be utilized by law enforcement agencies and others including the court.

Our legislature saw fit to allow these criteria to be utilized solely by a court and in its discretion and in addition to other relevant factors. Obviously, this gives by virtue of the very words "in its discretion" the right of various courts throughout the State to construe subjectively on the same identical object involved its own subjective definition of whether or not, or conclusion of whether or not a particular object under a particular identical circumstance constituted drug paraphernalia as proscribed by the statute.

The 10th Circuit in a very tortured reasoning process read into its decision that the legislature by specifically leaving out law enforcement agencies and others, specifically meant to include it. I don't agree with the tortured reasoning of the 10th Circuit in that reagrd. And, fortunately, I'm not bound by their decision, although I do have the highest respect for our Federal courts, both at the District Court level, and at the Court of Appeals level. Fortunately, I am neither not bound nor am I persuaded by some of their tortured and illogical reasoning.

The question of intent was also raised in the statute because the statute does refer to intent in various sections. Referring in 12-22-502, subsection (2), the words "primarily adapted, designed, and intended for one or more of the following," listing four things such as, "To introduce into the human body any controlled substance under circumstances in violation of the laws of this state." Also appearing in the definition of the crime itself under 12-22-505 as it relates to this specific case:

> "Any person who sells or delivers, possesses with intent to sell or deliver, or manufactures with intent to sell or deliver equipment, products, or materials intending that such equipment, products, or materials will be used as drug paraphernalia."

By whom? That's the question the Court raises. By whom is this intent and by whom must it be used, and is the word "will be used" rather than "can be used" not important in the determination of whether or not one is violating the statute.

The Court has also considered the matter of the repeal of the former statute defining controlled substance as a dangerous drug and narcotic drug and the definitions as they appear in the controlled substance statute recently adopted by the legislature, and pursuant to the ruling in the *Arrington* case, 618 P.2d 744, citing *School District No. 1* v. *Hastings*, Court finds that in the drug paraphernalia statute there is a specific reference in 12-22-502, Subsection (1) as follows: " 'Controlled substance' means a narcotic drug, as defined in section 12-22-301 (16), or a dangerous drug as defined in section 12-22-403 (4)", which are no longer in existence. These are specific references to specific portions of specic statutes.

The Court does note, however, that there are definitions, general definitions, of controlled substances, and controlled narcotic substances in the new statute, but the ambiguity in the mind of someone attempting to conform with the law, even if he had these particular stat-

utes before him, as to whether or not he was bound by a repeal statute, or by a new statute redefining of these words, would leave certainly a great deal of vagueness and cause a lack of a due process of law which is essential in our justice system.

In *People* v. *the District Court*, 521 P.2d 1254, a 1974 case, our Supreme Court stated due process requires the statute to be sufficiently definite; to give notice of the proscribed conduct to one who wishes to avoid its penalties, and to guide the police, judge, jury, and counsel in its application. Further, where freedoms are potentially inhibited, the vagueness doctrine may require an especially demanding degree of specificity.

I think the right to pursuit of happiness, under the constitution of the United States, and the various provisions of our Colorado Constitution, require a freedom to earn a living legally within the confines of the State of Colorado. A determination of how one can earn a living legally, or how one would violate that proscription by earning a living illegally must be clear and definite in order to carry out the intent of both the United States and the Colorado Constitutions.

Under those circumstances, the Court feels that because those questions have been raised, and have raised serious questions in the mind of this Court as well as other questions which have been raised in counsel's for the plaintiffs brief as to the constitutionality of the statute, the Court feels that the plaintiff has met its burden of showing the likelihood of success in the trial on the merits.

Obviously, my ruling does not in any way make this statute unconstitutional. It merely retains a status quo so that an irreparable harm will not be done to the plaintiff during the interim that it will take for the trial court to whom the trial on the merits has been assigned to make its ultimate determination of the ultimate issue of fact of whether or not there is a lack of constitutionality

in violation of either the Colorado or the United States Constitution or both in this particular statute.

Last, but not least, it is incumbent upon this Court to balance the equities of the parties herein. The Court notes that for many, many, many years, the State of Colorado has successfully prospered and existed without a drug paraphernalia law being enforced, and I'm sure that the public interest of the People of the State of Colorado will not be so harmed within the next few months during the interim period prior to the final determination by the trial court of the merits of this case if this injunction were granted. Court feels that the status quo that must be preserved is the right of the people to make a living and the right of people to remain outside of our places of detention for violations of laws which may well be so vague as to be unconstitutional.

Under these circumstances, and based on what I have said previously, the Court is going to grant a preliminary injunction and refer this case back to the division from whence it came for final determination of this matter on its merits.

And further amplification or clarification needed?

MR. OLSON: People have nothing further.

MR. SCHWARTZ: Nothing, You Honor. Thank you.

THE COURT: Court will be in recess.

(Whereupon, the proceedings were concluded.)

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CLERK

No. 80-1681

In the
Supreme Court of the United States
October Term, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, ET. AL.,

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois corporation,

Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit.

MOTION TO AFFIRM

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TABLE OF CONTENTS

PAGE

Table of Authorities i

Motion to Affirm 1

The Ordinance Involved and the Nature of the Case .. 2

No Substantial Constitutional Issue Is Raised and the Sound Decision of the Court of Appeals Should be Affirmed 6

Conclusion 17

Appendix:

Ordinance 969-1978 and Guidelines 1a

TABLE OF AUTHORITIES

Cases:

Back Door Records v. *City of Jacksonville*, No. LR-C-80-314 (E.D. Ark. Jan. 8, 1981) 16

Colten v. *Kentucky*, 407 U.S. 104 (1972) 13, 14

Flipside, Etc. v. *Village of Hoffman Estates*, 485 F. Supp. 400 (N.D. Ill. 1980) 5

Flipside, Etc. v. *Village of Hoffman Estates*, 639 F.2d 373 (7th Cir. 1981) .....*passim*

Gaffey v. *Babb*, No. CA-13882 (Ct.App. Or. Feb. 23, 1981) 16

Geiger v. *City of Eagan*, 618 F.2d 26 (8th Cir. 1980) 13

General Store, Inc. v. *City of Albuquerque*, No. 81-0027-M (D.N.M. March 23, 1981) 16

Grayned v. *City of Rockford*, 408 U.S. 104 .....8, 10

Lazy J., Ltd. v. *The Borough of State College*, No. 80-1167 (M.D.Pa. Jan. 30, 1981) 16

PAGE

Leary v. *United States*, 395 U.S. 6 (1969) 8, 9, 10

Magnani v. *City of Ames*, 493 F.Supp. 1003 (S.D.Ia. 1980) 15

McGowan v. *Maryland*, 366 U.S. 420 (1960) 8, 15

Music Stop v. *City of Ferndale*, 488 F.Supp. 390 (E.D.Mich. 1980) 15

Record Revolution, No. 6 Inc. v. *City of Parma et al.*, 639 F.2d 916 (6th Cir. 1980) 16

Rose v. *Locke*, 423 U.S. 48 (1975) 13, 14

The Town Tobacconist v. *Degnan*, No. C-2198-80 (Super. Ct.Ch.N.J. March 12, 1981) 16

Weiler v. *Carpenter*, No. 80-637-JB (D.N.M. Feb. 11, 1981) 16

Statutes and Ordinances:

28 U.S.C. §2201 4

28 U.S.C. §2202 4

42 U.S.C. §1983 4

Ill.Rev.Stat., Ch. 23, §2357 11

Ill.Rev.Stat., Ch. 56½, §1312 .....11, 12, 13

Village of Hoffman Estates, Municipal Code, Ordinance No. 969-1978 and Guidelines .....*passim*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1681

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, a Municipal Corporation; VIRGINIA M. HAYTER, Individually and in her official capacity as President of the Village of Hoffman Estates, Illinois; RICHARD WILLIAMS, Individually and in his official capacity as Attorney for the Village of Hoffman Estates, Illinois; JOHN O'CONNELL, Individually and in his official capacity as Chief of Police for the Village of Hoffman Estates, Illinois; and the following, Individually and in their official capacity as Trustees for the Village of Hoffman Estates, Illinois: WILLIAM W. COWIN, WILLIAM A. PALMER, BRUCE C. LIND, RALPH H. LYERLA, THOMAS W. TAYLOR and LEE DODGION,

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois corporation,

Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit.

MOTION TO AFFIRM

The Appellee, The Flipside, Hoffman Estates, Inc., an Illinois Corporation (Flipside), respectfully moves this

Honorable Court, pursuant to Rule 16(1)(c) of the Rules of the Supreme Court of the United States, to affirm the judgment of the United States Court of Appeals for the Seventh Circuit on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial and the decision below so plainly correct as not to warrant further argument.

THE ORDINANCE INVOLVED AND THE NATURE OF THE CASE

On February 20, 1978, the Village of Hoffman Estates Board of Trustees (Village) enacted Ordinance No. 969-1978, entitled "An Ordinance Amending the Municipal Code of the Village of Hoffman Estates by Providing for Regulation of Items Designed or Marketed for Use with Illegal Cannabis or Drugs," to be effective May 1, 1978. (The Ordinance and Guidelines are appended hereto). The ordinance provides that persons engaged in the business of retailing any "item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" must obtain a license in order to do so. An applicant must pay a $150 fee and also provide affidavits establishing that every employee authorized to sell such items has never been convicted of a drug related offense. The ordinance requires a licensee to maintain a police register containing the name and address of every purchaser, the time and date of purchase, and the signature of the selling licensee or his agent. The police register must be kept available for police inspection during business hours for two years following the respective dates of purchase. The acknowledged purpose of the police register was to discourage the purchase of anything deemed "designed or marketed for use with illegal cannabis or drugs." The ordinance

totally bans the transfer of items so deemed to persons under eighteen years of age. A violation of the ordinance is punishable by a fine of not less than $10 or more than $500, and each day a violation continues constitutes a separate offense. In the opinion of the Village officials prior to the enactment of the ordinance, Flipside Records was the only merchandiser in the Village that would be subject to the ordinance.

The Village also issued guidelines defining the terms of the ordinance and which were intended to be read in conjunction with it. The guidelines provide that cigarette rolling papers that are of "colorful design" (as opposed to white cigarette rolling papers), cigarette rolling papers with trade names "oriented for use with illegal cannabis or drugs," and all "roach clips" are *per se* within the purview of the ordinance. Pipes and "paraphernalia" fall within the coverage of the ordinance when they are displayed in "proximity" to "literature encouraging illegal use of cannabis or illegal drugs" or "roach clips."

Flipside is an Illinois corporation that owns and operates a business known as Flipside Records in the Village of Hoffman Estates. Since opening in 1976, Flipside Records has sold phonograph records, recording tape, clothing, jewelry, decorative mirrors, tobacco-smoking and snuff accessories (including white and non-white cigarette rolling papers), as well as a variety of literature including "National Lampoon," "Rolling Stone" and "High Times."

After agents of the Village notified Flipside personnel that the store was covered by the ordinance, Larry Rosenbaum, an officer of Flipside, telephoned Richard Williams, Hoffman Estates Village Attorney, and inquired what

items in his store were covered by the ordinance. Mr. Williams advised Mr. Rosenbaum to use the police register for all items, for his protection.

Flipside initiated proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, on May 30, 1978, seeking a declaratory judgment that the ordinance violated the First, Fourth, Fifth, Eighth and Fourteenth Amendments, Article I, §8, Clause 3 and Article I, §10 of the United States Constitution pursuant to 42 U.S.C., §1983 and 28 U.S.C. §§2201 and 2202; and further seeking temporary, preliminary and permanent injunctive relief and damages pursuant to 42 U.S.C., §1983 for the actions of the Village and its agents, under color of law, which caused Flipside to be deprived of rights secured to it by the United States Constitution.

On May 30, 1978, the Honorable George N. Leighton denied Flipside's emergency motion for a temporary restraining order; and on September 1, 1978 denied Flipside's motion for preliminary injunction.

The trial for permanent injunction and declaratory judgment was held on March 23, 1979. The evidence and stipulated testimony established that no expert reports or statistics had been submitted to either the Committee on Health, Safety and Welfare or the Board of Trustees which would have provided a factual basis for the conclusion upon which the ordinance and guidelines were based. Neither the Village Attorney, who drafted the ordinance and guidelines, nor the Village President, who cast the tie-breaking vote enacting the ordinance, could specifically state which of the myriad exhibits in evidence at trial were covered by the ordinance, and both admitted they would have to rely on police opinion to inform them which objects were presumed to be "designed or marketed

for use with illegal cannabis or drugs." None of the witnesses were able to specify any unique structural design characteristics distinguishing ordinary items from "drug paraphernalia." The intended impact of the ordinance was shown instead to be a merchant's "manner of marketing." Under the ordinance and guidelines the proximity of literature deemed to encourage the "illegal use of cannabis or illegal drugs" to items not otherwise covered activates the requirement of a license, the police register and other attendant penalties. Further, the presence of any of the *per se* items noted in the guidelines, e.g. colored cigarette rolling papers, would extend the applicability of the ordinance's provisions to surrounding items not otherwise regulated. Also, evidence established that the presence of a phrase or symbol suggesting possible association with controlled substances would likewise trigger the ordinance. All of the witnesses admitted that specific determinations as to what items from time to time were to be considered covered by the ordinance would be left to the unguided judgment of the police.

On February 11, 1980, the trial court entered a Memorandum Order awarding judgment to the Village. After various post-trial motions, a timely notice of appeal was filed, and after full briefing and oral argument, the United States Court of Appeals for the Seventh Circuit, on January 12, 1981, reversed the judgment of the District Court. The Village's petition for rehearing was denied on February 12, 1981. The Village's Jurisdictional Statement was filed in this Honorable Court on April 3, 1981 and docketed as case No. 80-1618. The Memorandum Order of the trial court is reported at 485 F.Supp. 400 (N.D. Ill. 1980); and the Opinion of the Seventh Circuit is reported at 639 F.2d 373 (7th Cir. 1981).

NO SUBSTANTIAL CONSTITUTIONAL ISSUE IS RAISED, AND THE SOUND DECISION OF THE COURT OF APPEALS SHOULD BE SUMMARILY AFFIRMED

The Appellee, Flipside, submits to this Honorable Court that the decision of the United States Court of Appeals properly resolved the merits of this litigation on the basis of time-honored and well established tenets of Constitutional law. Although the Seventh Circuit addressed only one of the several Constitutional defects manifest on the face of the subject ordinance, the grounds of the opinion are so plainly correct, and the serious potential for abuse noted therein is so well supported in the record that no remand for determination of the undecided Constitutional violations asserted is necessary.

The Seventh Circuit set forth the sound and well-known underpinnings of its decision, stating:

> In *Grayned* v. *City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), the Supreme Court set out the policies behind the due process doctrine of vagueness. In a passage cited in virtually every opinion dealing with vagueness challenges to statutes or ordinances, the Court stated:
>
> > It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws often offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide ex-

> plicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09, 92 S.Ct. at 2298-99 (footnotes omitted). See also *Smith* v. *Goguen*, 415 U.S. 566, 572, 94 S.Ct. 1242, 1246, 39 L.Ed.2d 605 (1974); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

This ordinance is subject to attack for vagueness despite the fact that it is an ordinance, not a statute, and it purports to license, not prohibit, sale of "items designed or marketed for use with illegal cannabis or drugs." A law may run afoul of the vagueness doctrine even though it does not impose criminal sanctions because the fundamental defect is not the penalty but rather "the exaction of obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 589 (1925). The lack of a criminal penalty in the ordinance does not excuse vagueness where the effect is to deprive persons of constitutional rights. *Giaccio* v *Pennsylvania*, 382 U.S. 399, 402, 86 S.Ct. 518, 520, 15 L.Ed.2d 447 (1966) ("this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"). See also *Benee* v. *Breier*, 501 F.2d 1185, 1188 (7th Cir. 1974), cert. denied, 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 821 (1975); *Soglin* v. *Kauffman*, 418 F.2d 163, 166-67 (7th Cir. 1969). Furthermore, in determining whether a civil or criminal enactment is sufficiently clear that persons affected can determine what the law requires of them, the same rules of construction apply whether it is a statute or an ordinance. *Martin* v. *King*, 417 F.2d 458, 461 (10th Cir. 1969).

Flipside Etc. v. *Village of Hoffman Estates,* 639 F.2d 373, 377-78 (7th Cir. 1981). The Appellee contends that it is manifest that no novel constructs or doctrines bore on the decision of the Seventh Circuit and that no substantial issue of constitutional law is presented by this case.

The Appellants concede that the Circuit Court properly utilized the principles expounded in *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), but argues that the Circuit Court should have validated the ordinance nevertheless on the basis of *Leary* v. *United States,* 395 U.S. 6 (1969) and *McGowan* v. *Maryland,* 366 U.S. 420 (1960). (Jurisdictional Statement p.5). It is apparently the Appellants' position that the *Leary* case supports and justifies the ordinance's presumption that a police determination regarding a particular marketing arrangement necessarily implies that all items displayed in spatial proximity thereto are "designed or marketed for use with illegal cannabis or drugs;" and that the *McGowen* case dispenses with the need for specificity and fair warning of what the law requires by simply imposing a burden of locating and surveying the preferences of drug abusers upon the target merchants. The Appellee will argue that the Seventh Circuit quite properly dismissed any contention that (1), from some undefined marketing scheme or display, it could be inferred with "substantial assurance" that any or all of the items therein contained, and indeed, the entire business, was engaged in distributing items "designed or marketed for use with illegal cannabis or drugs," *Leary* v. *United States, supra,* at 36; and (2), that the Seventh Circuit quite properly dismissed the notion of imposing a "merchant standard" upon persons alleged to be in the business of

selling items "designed or marketed for use with illegal cannabis or drugs" as being obviously circular, *i.e.,* for the standard to apply the licensee must be presumed a merchant of items designed or marketed to violate the law. The Appellee respectfully submits that no contention raised in the Appellants' Jurisdictional Statement raises a substantial federal question and all were cogently resolved by the Seventh Circuit on the basis of sound and established principles.

According to the Appellants, the foundation of the Hoffman Estates' scheme is comprised of three "known and trustworthy legal facts." (Jurisdictional Statement p.5). First, the Appellants reassert their claim that the presumption contained in the ordinance passes the stringent test enunciated in *Leary* v. *United States, Id.; i.e.,* that empirical data establishes with "substantial assurance" that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Id.* at 36, 37. The ordinance, guidelines and evidence adduced at trial indicated that a regulated "marketing scheme" would be found whenever one or more items of a genus that police have found in the past to have been used with controlled substances were displayed; or, whenever literature considered "encouraging illegal use of cannabis or illegal drugs" was in "proximity." Applied to the Hoffman Estates' scheme the question becomes: does the "fact proved," (the retailer's "marketing scheme"), provide substantial assurance that the "presumed fact," (that the retailer's merchandise consists of "items, effect[s], paraphernalia, accessory[s] or thing[s] . . . designed or marketed for use with illegal cannabis or drugs"), is more likely than not? *Id.* at 37. The Seventh Circuit answered in

the negative, stressing that the fact allegedly proved failed to meet the threshold test. The fact to be proved is so vaguely intimated and susceptible to subjective and perhaps prejudiced interpretation that neither those who might be deemed expected to comply nor those entrusted to vigorously enforce the law would know what to expect from the other. *Grayned* v. *City of Rockford, supra* at 108, 109; *Flipside, Etc.* v. *Village of Hoffman Estates, supra* at 382. Therefore, since there is no marketing scheme defined with constitutional adequacy in the ordinance or guidelines, the operational "fact proven" can never be established.[1] The Seventh Circuit incisively distinguished the vagueness issue in the case at bar from the "rational connection" issue in *Leary. Flipside, Etc.* v. *Village of Hoffman Estates, supra* at 382. The face of the ordinance and guidelines, as well as the testimony of the Village officials at trial, proclaim the intention to establish a system of harrassment based upon several vague and irrebuttable presumptions and activated by the unguided opinions of police officers who may be offended by the arrangement of items in a display case or the "proximity" of literature that might be considered to "encourage illegal use of cannabis or illegal drugs." To premise a statutory presumption *vis a vis Leary* on such a "fact proven" was correctly adjudged untenable. *Id.* at 382.

The second "trustworthy legal fact" proffered by the Appellant in support of the subject ordinance is the

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[1] The concept of burdening the free display of commercial offerings, especially in light of those guidelines triggering enforcement and penalty on the basis of what might be protected, commercial, symbolic or pure speech, raised First Amendment issues which were before but not discussed by the Seventh Circuit.

existence of an Illinois statute prohibiting the sale of tobacco to persons under the age of eighteen. Ill.Rev.Stat., Ch.23, §2357. Assuming that this is tendered in support of that portion of the ordinance proscribing the sale or gift of items "designed or marketed for use with illegal cannabis or drugs" to minors, the Appellee respectfully submits that the Illinois statute is irrelevant to any issue presented by this case.

The third "trustworthy legal fact" completing the cornerstones of the Hoffman Estates' enactment is the existence of an Illinois statute that exempts certain specifically defined controlled substances from the prescription requirement if certain procedures are followed. Ill.Rev.Stat., Chap. 56½, §1312. This section was adopted as part of the enactment of the Uniform Controlled Substances Act. Presumably, this statute is urged as analogous to and precedent for the subject ordinance's requirement of the police register. §1312 requires that the specifically enumerated controlled substances be dispensed only by a registered person, dispensed only to a person proven by two positive documents to be over 21 years old, and, that the name and address of the purchaser, the name and quantity of the specifically exempted product, the time and date of sale, and the dispenser's signature by memorialized. Ill.Rev.Stat., Chap. 56½, § 1312 (c)(1)(2)(3). The Department of Registration and Education form also serves as an attestation that the Schedule V purchaser has not obtained any other Schedule V substances within the proceeding 96 hours. Ill.Rev. Stat., Chap. 56½, §1312 (c)(7). The records maintained pursuant to Ill.Rev.Stat., Chap. 56½, §1312 are required by law to be forwarded to the Illinois Department of Registration and Education by the 15th day of each

following month. Ill.Rev.Stat., Chap. 56½, §1312 (c)(5). The purpose of this statute and its recording requirement is plainly to enable the state to investigate and perhaps prosecute fraudulent purchasers of specifically defined controlled substances, and to regulate pharmacists who may be inclined to violate this statute. This provision stands in stark contrast to the police register envisioned by the subject ordinance. The record in this case establishes that the admitted purpose of the Hoffman Estates' police register was to discourage the sale of items subjectively deemed by the police to be "covered." The Appellee's agent, Larry Rosenbaum, was unequivocally advised to utilize the police register for every item in his store, "for his protection." *Flipside, Etc.* v. *Village of Hoffman Estates,* 369 F.2d at 375 n.1).[2] Moreover, §1312, entitled "Dispensing controlled substances," demands prompt transmission by the

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[2] The record establishes that items functionally indistinguishable from those sold at Flipside were sold at numerous drug hardware and variety stores throughout the Village, and that none of them had been threatened or even considered subject to application of the ordinance. The Appellants' exculpatory analogy of the subject regulation to its regulation of milk, flowers "and 68 other activities requiring licensing" (Jurisdictional Statement p.5) thus becomes transparent. An esthetic and subjective opinion deeming a particular display arrangement overly provocative will condemn one retailer while another, offering almost identical merchandise will be left unscathed perhaps because of a more favored or established status. There is thus no parallel between a regulation of milk, for example, and the subject regulation, because *all* purveyors of milk will be subjected to that type of regulation, while only retailers of "alligator clips" who offend the "marketing" sensibilities of the police will be subjected to the ordinance herein.

licensee of the required records directly to the Illinois Department of Registration and Education; whereas, the subject ordinance compels the licensee to be prepared at any time during business hours to produce at the whim of any police officer two years worth of records in which the retailer and purchaser are forced to publicly memorialize the sale of items thereby acknowledged to be "designed or marketed for use with illegal cannabis or drugs." There are no safeguards in either the ordinance or guidelines limiting the purposes and uses to which the recorded information may be put. *See Id.* at 384, 385; *Geiger* v. *City of Eagan*, 618 F.2d 26, 29 (8th Cir. 1980). Also, unlike Schedule V controlled substances, the items or design arrangements sought to be burdened by the subject ordinance are admittedly "legal retail items." (Appendix). It is readily apparent that the analogy to §1312 is inappropriate and in no manner lends credence or support to the validity of the Hoffman Estates' enactment.

The Appellants' reference to the cases of *Colten* v. *Kentucky*, 407 U.S. 104 (1972) and *Rose* v. *Locke*, 423 U.S. 48 (1975), presumably included in the Jurisdictional Statement to illustrate that some statutes have been found to pass constitutional muster in spite of their uncontested vagueness, provide no support for the system enacted by the Village. First, the enactment in *Colten* (disorderly conduct/refusal to disperse) and the enactment in *Locke* (crimes against nature) are definitely unsusceptible to a viable facial challenge — standing being only one of the legal obstacles. Second, both cases involve criminal convictions requiring the presence of a tangible *actus reus*. Both cases required a construction of the enactments in the light of fixed

and given conduct, including evidence of a wilful state of mind. In such a situation the vagueness issue is resolved by a determination whether the particular defendant, at the time he engaged in the particular conduct, would or should be aware that his conduct was proscribed by law. In the case at bar, the Appellee, Flipside, was notified that it was the target for enforcement of a new ordinance, and that the ordinance should be considered applicable to every item in its store. The ordinance and guidelines condition enforcement upon lawful activity including the display of certain literature. The Appellee cut back a significant portion of its merchandise, without exception lawful items, on advice of counsel, and instituted proceedings prospectively challenging the ordinance on its face. In both *Colten* and *Locke* the fixed conduct of the defendants was merely adjudged to be obviously contemplated by the statutes. In the instant case, the conduct, i.e. retailing things "designed or marketed for use with illegal cannabis or drugs," could not even be delineated by the Village Attorney, who drafted the ordinance and guidelines; the Village President, who broke the tie vote in the Board of Trustees, thereby enacting the Hoffman Estates' scheme; or the Chief of Police, whose stipulated testimony indicated that even he was unable to make any specific determinations as to what items are covered. Yet, the Appellee was singled out and threatened with enforcement. *Colten* and *Locke*, resolving only "as applied" challenges, are in no manner contrary to the evaluation and interpretation of the Hoffman Estates' scheme arrived at by the Seventh Circuit, and, thus, fail to raise any substantial federal issue.

The Appellants also advance the proposition that since their enactment is "but a regulatory ordinance for specific

retailers who have the opportunity of clarification prior to license application," the doctrine espoused in the case of *McGowan* v. *Maryland, supra,* should not have been discarded by the Seventh Circuit. Specifically, the proposition is that since Flipside has been deemed engaged in retailing items "designed or marketed for use with illegal cannabis or drugs," they should be apprised as to the scope of the ordinance either as a "matter of ordinary commercial knowledge" or "simply by making a reasonable investigation." (Jurisdictional Statement p.7). The suitability of imposing the burden required by the subject ordinance upon a retailer situated like the Appellee was flatly rejected by the Seventh Circuit. First, the Appellee contests the notion that it is engaged in retailing items "designed or marketed for use with illegal cannabis or drugs." Second, it is obvious that a legitimate merchant cannot simply immerse himself in the subterranean and clandestine world of drug abusers and ascertain what sort of device is deemed by actual inhabitants of this hidden world to be designed or marketed for drug use. The *McGowan* decision specifically identified an extrinsic and accessible reference source, i.e. the beach or amusement park, by which the merchant in that case could easily and reliably determine the items which could be sold on Sundays. In the case at bar no such reference source exists. *See Music Stop* v. *City of Ferndale,* 488 F.Supp. 390 (E.D.Mich. 1980); *accord Magnani* v. *City of Ames,* 493 F.Supp. 1003 (S.D. Ia. 1980). The Seventh Circuit correctly noted the inapplicability of this standard to the type of ordinance herein displayed.

The allegations of "numerous conflicts" and "wide splits of authority", and the appended list of "Recent Drug Paraphernalia Cases" (Jurisdictional Statement pp.5, 5a)

have no bearing whatsoever on the case at bar. The decisions cited are concerned only with the Model Drug Paraphernalia Act or its variations.[3] The Hoffman Estates' scheme, on the other hand, seeks to establish a strict liability system premised specifically on the nature of the individual items or the "marketing" approach adopted by a particular retailer, and is thus unrelated to any Model Act litigation. The scheme herein is *sui generis* and unaffected by any alleged disparity in decisions examining a completely different type of ordinance.

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[3] It should be noted that subsequent to the opinion of the United States Court of Appeals for the Sixth Circuit in the case of *Record Revolution, No. 6, Inc.* v. *City of Parma et al.*, 639 F.2d 916 (6th Cir. 1980), all of the cases examining the approach adopted by the model act have been in harmony. See *General Stores, Inc.* v. *City of Albuquerque*, No. 81-0027-M (D.N.M. March 23, 1981); *Weiler* v. *Carpenter*, No. 80-637-JB (D.N.M. Feb. 11, 1981); *Lazy J., Ltd.* v. *The Borough of State College*, No. 80-1167 (M.D. Pa. Jan. 30, 1981); *Back Door Records* v. *City of Jacksonville*, No. LR-C-80-314 (E.D. Ark. Jan. 8, 1981); *Gaffey* v. *Babb*, No. CA-13882 (Ct.App.Or. Feb. 23, 1981); *The Town Tobacconist* v. *Degnan*, No. C-2198-80 (Super. Ct.Ch. N.J. March 12, 1981).

CONCLUSION

WHEREFORE, on the basis of the above, the Appellee, Flipside Records, Hoffman Estates, Inc., prays this Honorable Court to affirm the Judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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& PRITZKER
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APPENDIX

ORDINANCE NO. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

Now THEREFORE, BE ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with il-

legal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs	$150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper or colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of non-white paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

No. 80-1681

Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, et al.

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE APPELLANTS

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July, 1981

APPEAL DOCKETED APRIL 3, 1981
PROBABLE JURISDICTION NOTED JUNE 1, 1981

Pandick Press Midwest, Inc., Chicago • (312) 454-7600

QUESTION PRESENTED

1. The Village's Drug Paraphernalia Licensing Ordinance defines the licensed goods as "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs". The question presented is whether such phrase is so vague as to render the ordinance unconstitutional.

PARTIES TO THE PROCEEDING BELOW:

Appellant is the Village of Hoffman Estates, Illinois, a Municipal Corporation; Virginia M. Hayter, Individually and in her official capacity as President of the Village of Hoffman Estates, Illinois; Richard N. Williams, Individually and in his official capacity as Attorney for the Village of Hoffman Estates, Illinois; John O'Connell, Individually and in his official capacity as Chief of Police for the Village of Hoffman Estates, Illinois; and the following, Individually and in their official capacity as Trustees for the Village of Hoffman Estates, Illinois: William W. Cowin, William A. Palmer, Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor and Lee Dodgion.

Appellee is The Flipside, Hoffman Estates, Inc., an Illinois Corporation.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Parties to the Proceeding Below	i
Table of Authorities	iii
The Opinions Below	1
Ground on Which Jurisdiction is Invoked	2
Constitutional Provisions and Ordinances Involved	2
Statement	3
Summary of Argument	6
Argument:	
I. The Hoffman Estates Drug Paraphernalia Ordinance that licenses items which are "designed or marketed for use with illegal cannabis or drugs" is a valid and constitutional enactment	9
A. The Ordinance provides sufficient warning to avoid that which is forbidden	10
1. Standard of Review of "sufficient warning"	10
2. "Sufficient warning" is provided by words "designed for use" and "marketed for use"	14
3. The phrases "designed for use" and "marketed for use" connote the requisite scienter required	21
B. The Ordinance provides adequate guidelines to prevent arbitrary and discriminatory enforcement	23
Conclusion	26

TABLE OF AUTHORITIES

Cases

PAGE

Grayned v. *City of Rockford*, 408 U. S. 104, 92 S. Ct. 2294 (1972) 9, 23
Smith v. *Goguen*, 415 U. S. 566, 94 S. Ct. 1242 (1974) 9, 23
A. B. Small Co. v. *American Sugar Refining Co.*, 267 U. S. 233, 45 S. Ct. 295 (1925) 10
Jordan v. *DeGeorge*, 341 U. S. 223, 71 S. Ct. 703 (1951) 10
Giaccio v. *State of Pennsylvania*, 382 U. S. 399, 86 S. Ct. 518 (1966) 11, 23
Barenblatt v. *United States*, 360 U. S. 109, 79 S. Ct. 1081 (1959) 11
United States v. *National Dairy Products Corp.*, 372 U. S. 29, 83 S. Ct. 594 (1963) 12
Hynes v. *Mayor and Council of Borough of Oradell*, 425 U. S. 610, 96 S. Ct. 1755 (1976) 12
Winters v. *New York*, 333 U. S. 507, 68 S. Ct. 665 (1948) 12
United States v. *Powell*, 423 U. S. 87, 96 S. Ct. 316 (1975) 12
United States v. *Mazurie*, 419 U. S. 544, 95 S. Ct. 710 (1975) 12
McGowan v. *Maryland*, 366 U. S. 420, 81 S. Ct. 1101 (1961) 12, 13
Hygrade Provision Co. v. *Sherman*, 266 U. S. 497, 45 S. Ct. 141 (1925) 13
Connally v. *General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126 (1926) 13
Moore Ice Cream Co. v. *Rose*, 289 U. S. 373, 53 S. Ct. 620 (1933) 14
Aptheker v. *Sec. of State*, 278 U. S. 500, 84 S. Ct. 1659 (1964) 14
Robinson v. *United States*, 324 U. S. 282, 65 S. Ct. 666 (1945) 14

PAGE

Boyce Motor Lines v. *United States*, 342 U. S. 337, 72 S. Ct. 329 (1952) 14

Papachristou v. *City of Jacksonville*, 405 U. S. 156 (1972) 14

Record Revolution No. 6, Inc. v. *City of Parma*, 638 F. 2d 916 (6th Cir.—1980) 15, 18, 21, 22

Hejira Corp. d/b/a Budget Records & Tapes, Inc. v. *J. D. McFarlane*, No. 80-2062, May 5, 1981, ____ F. 2d ____ (10th Cir.—1981) 15

The Casbah, Inc. v. *Thone*, 80-2033, June 8, 1981, ____ F. 2d ____ (8th Cir.—1981) 15, 16, 22

New England Accessories Trade Association, Inc. v. *Browne*, 502 F. Supp. 1245 (D. Conn.—1980) ... 16

Mid-Atlantic Accessories Trade Association v. *Maryland*, 500 F. Supp. 834 (D. Md.—1980) 16, 18, 24

Delaware Accessories Trade Association v. *Gebelein*, 497 F. Supp. 289 (D. Del.—1980) 16, 22

Brache v. *County of Westchester*, 507 F. Supp. 566 (S. D. N. Y.—1981) 16

Screws v. *United States*, 325 U. S. 91, 65 S. Ct. 1031 (1945) 16

Backun v. *United States*, 112 F. 2d 635 (4th Cir.—1940) 17

World Imports v. *Woodbridge Township*, 493 F. Supp. 428 (D. N. J.—1980) 18, 20, 25

Israel v. *United States*, 63 F. 2d 345 (3rd Cir.—1933) 19

Record Museum v. *Lawrence Township*, 481 F. Supp. 768 (D. N. J.—1979) 19

Leary v. *United States*, 395 U. S. 6, 89 S. Ct. 1532 (1969) 20, 21, 23

County Court of Ulster County v. *Allen*, 442 U. S. 140, 99 S. Ct. 2213 (1979) 20

Barnes v. *United States*, 412 U. S. 837, 93 S. Ct. 2357 (1973) 21

United States v. *Petrillo*, 332 U. S. 1, 67 S. Ct. 1538 (1947) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, et al.

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE APPELLANTS

THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported at 639 F. 2d 373 (1981) and further appears in the Appendix to the Jurisdictional Statement at page 1a.

The opinion of the United States District Court, Northern District of Illinois, is officially reported at 485 F. Supp. 400 (1980), and further appears in the Appendix to the Jurisdictional Statement at page 28a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

On February 20, 1978, the Board of Trustees of the Village of Hoffman Estates, Illinois, a home rule municipality, enacted its Ordinance No. 969-1978.

The initial action was filed in the District Court for the Northern District of Illinois by The Flipside, Hoffman Estates, Inc. against the Village of Hoffman Estates and its officials, pursuant to 28 U. S. C. 1331, 2201, 2202 and 28 U. S. C. 1343 and 42 U. S. C. 1983; it challenged the constitutionality of the ordinance and sought damages and declaratory and injunctive relief against enforcement of the Village of Hoffman Estates Ordinance. Following hearings on the requests for preliminary and permanent injunctions, the District Court concluded that the Village of Hoffman Estates Ordinance 969-1978 was constitutional and it entered final judgment for the defendant Village and officials on April 4, 1980.

An appeal was taken by Plaintiff to the United States Court of Appeals for the Seventh Circuit by filing Notice of Appeal on April 7, 1980. The Appeals Court reversed the District Court in a judgment entered January 12, 1981. A petition for rehearing was filed in the Court of Appeals for the Seventh Circuit. On February 5, 1981, the Court of Appeals denied the petition for rehearing. A notice of appeal to this Court was filed on March 19, 1981, in the Court of Appeals for the Seventh Circuit.

The Jurisdictional Statement was filed with this Court on April 3, 1981 requesting review pursuant to 28 U. S. C. Sec. 1254(2). This Court noted probable jurisdiction on June 1, 1981.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

Fourteenth Amendment, United States Constitution:

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Village of Hoffman Estates Ordinance 969-1978 is set forth in the Appendix to the Jurisdictional Statement at 48a.

STATEMENT OF THE CASE

In February of 1978, the Village of Hoffman Estates passed the subject ordinance in an effort to cope with the drug paraphernalia problem by licensing the sale to adults and banning the sale to minors. Eighteen months later, the Drug Enforcement Administration of the United States Department of Justice published a "Model Act" to deal with the problem which has been passed by many states and local jurisdictions and is the subject of much litigation throughout the country. The "Model Act" creates criminal penalties for possession of drug paraphernalia. The ordinance herein licenses the business selling such items and forbids the sale to minors and does not criminalize the use or possession of such items.

The ordinance provides that persons engaged in the business of retailing any "item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" must obtain a license in order to do so. An applicant must pay a $150 fee and also provide affidavits establishing that every employee authorized to sell such items has never been convicted of a drug related offense. The ordinance requires a licensee to maintain records containing the name and address of every purchaser, the time and date of purchase, and the signature of the selling licensee or his agent. The register must be kept available for police inspection during business hours for two years following the respective dates of purchase. The ordinance bans the transfer of items so deemed to persons under eighteen years of age. A violation of the ordinance is punishable by a fine of not less than $10 or more than $500.

The Village also issued preliminary guidelines defining the terms of the ordinance which were intended to be read in conjunction with it (JA 68). The guidelines provide that cigarette rolling papers that are of "colorful design" (as opposed to white cigarette rolling papers), cigarette rolling papers with trade names "oriented for use with illegal cannabis or drugs", and all "roach clips" are per se within the purview of the ordinance. Pipes and "paraphernalia" fall within the coverage of the ordinance when they are displayed in "proximity" to "literature encouraging illegal use of cannabis or illegal drugs" or "roach clips" (Juris. St. 33a).

Flipside is an Illinois corporation that owns and operates a business known as Flipside Records in the Village of Hoffman Estates. Since opening in 1976, Flipside Records has sold phonograph records, recording tape, clothing, jewelry, novelty devices, as well as a variety of literature, but does not acknowledge it sells drug related paraphernalia (JA 40).

Flipside initiated proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, on May 30, 1978, seeking a declaratory judgment that the ordinance violated the First, Fourth, Fifth, Eighth and Fourteenth Amendments, Article I, § 8, Clause 3 and Article I, § 10 of the United States Constitution pursuant to 42 U. S. C., § 1983 and 28 U. S. C. §§ 2201 and 2202; and further seeking temporary, preliminary and permanent injunctive relief and damages pursuant to 42 U. S. C., § 1983 for the actions of the Village and its agents, under color of law, which caused Flipside to be deprived of rights secured to it by the United States Constitution.

On May 30, 1978, the Honorable George N. Leighton denied Flipside's emergency motion for a temporary restraining order; and on September 1, 1978 denied Flipside's motion for preliminary injunction.

The trial for permanent injunction and declaratory judgment was held on March 23, 1979. The evidence and stipulated testimony established that no expert reports or statistics had been submitted to either the Committee on Health, Safety and Welfare or the Board of Trustees prior to passage of the ordinance (JA 55). A Hoffman Estates police officer testified to facts indicating in his experience, items of the type sold by Flipside were generally found in police related experiences to be used with illegal drugs (JA 51-52). Neither the Village Attorney, who drafted the ordinance and guidelines, nor the Village President, who cast the tie-breaking vote enacting the ordinance, could specifically state which of the myriad exhibits in evidence at trial were covered by the ordinance, and both admitted they would have to rely on police opinion to inform them which objects were presumed to be "designed or marketed for use with illegal cannabis or drugs" if presented the items (JA 67 & 84). The intended impact of the ordinance was shown instead to be a merchant's "manner of marketing". Under the ordinance and guidelines the proximity of literature deemed to encourage the "illegal use of cannabis or illegal drugs" to items not otherwise covered activates the requirement of a license, the register and other attendant penalties.

The Village Administrative Procedures Act (Juris. St. 24a) had not been implemented as no establishment had applied for a license (JA 68).

The original complaint of Appellee Flipside requested damages and injunctive relief because, among other claims, it was alleged the ordinance was "void for vagueness". The United States District Court upheld the ordinance against all constitutional attacks including "void for vagueness".

The Court found that the ordinance was narrowly drawn and recognized that "paraphernalia" has become a standard vocabulary word in the vernacular of the community (Juris. St. 38a). It found that the terms were sufficiently clear to give a reasonably clear idea of what the law requires (Juris. St. 39a).

On February 15, 1980, the trial court entered a Memorandum Order awarding judgment to the Village (JA 88). After a Petition for Rehearing (JA 89) and Petition to Reconsider (JA 96), a timely notice of appeal was filed (JA 110) and after full briefing and oral argument, the United States Court of Appeals for the Seventh Circuit, on January 12, 1981, reversed the judgment of the District Court.

The Seventh Circuit Court of Appeals limited its opinion to only the "void for vagueness" issue finding the ordinance violative of the Fourteenth Amendment since a retailer "is unable to determine what the law expects of him" (Juris. St. 26a). The court recognized that "in the field of regulatory statutes governing business activities ... greater leeway is allowed" but stated that said standard "does not fit in this case" (Juris. St. 20a).

The Court also found no rational connection between testimony that the items had been found to be used with illegal drugs (fact proved) and that therefore, said items were marketed for use with illegal drugs (fact presumed) (Juris. St. 18a).

The Village's petition for rehearing was denied on February 12, 1981 (Juris. St. 46a). The Village's Jurisdictional Statement was filed in this Honorable Court on April 3, 1981 and docketed as Case No. 80-1681.

SUMMARY OF ARGUMENT

It has not been in controversy that the subject Ordinance must pass the two-pronged vagueness test set out by *Grayned* v. *City of Rockford*, 408 U. S. 104. That test requires that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and must provide explicit standards to those who must enforce the laws. A lesser standard of scrutiny, however, applies to a law that does not proscribe criminal activity or regulate First Amendment conduct. Since

the subject Ordinance only regulates the conduct of retailers, it is therefore recognized that the vagueness test of this licensing Ordinance would apply to a retailer with commercial knowledge of the subject matter as stated in *McGowan* v. *Maryland,* 336 U. S. 420.

The words of the Ordinance, "designed for use" with illegal drugs referring to items regulated have been interpreted to connote an intentional act in drug paraphernalia cases in the U. S. Courts of Appeal and District Courts and such interpretation should be made here as an intent standard ought to be read into the law where possible to save its constitutionality, *Screws* v. *United States,* 325 U. S. 91.

The words of the Ordinance "marketed for use" with illegal drugs eliminate the need to determine item by item which generally innocent items must be regulated. Such items need only be regulated when the retailer determines to retail them in a peculiar arrangement or amongst other apparently innocent items whose only common denominator would be use with controlled substances. Judicial notice of such drug paraphernalia marketing techniques has been taken by the lower Federal Courts and should specifically be taken here. The manner of marketing, the fact proved, creates a *Leary* v. *United States,* 395 U. S. 6, presumption that there is a "rational connection" that such items will be used with illegal drugs as the evidence in this case shows this is "more likely than not" to occur. This proof would require a showing of scienter by the retailer who chooses to market in such a manner.

The second prong of *Grayned* calls for standards of enforcement. Although the Village has an Administrative Procedures Act for such purposes, since no retailer had applied for a license at the time of the complaint, no hearings had been held but guidelines for enforcement had been issued by the Village prior to the effective date of the law. Such guidelines were not unlike those of the Drug Enforcement Agency's Model

Act which was drafted some eighteen months after the Village's Ordinance. Such guidelines of the Model Act, a law that creates criminal penalties for mere possession of drug paraphernalia have been upheld by the Eighth Circuit, Tenth Circuit (rejected by the Sixth Circuit) and numerous Federal Courts. Under the standard of lesser scrutiny, the Village's guidelines in conjunction with the Ordinance and the Administrative Procedures Act availability provide fair standards to retailers in the community.

ARGUMENT

I.

The Hoffman Estates Drug Paraphernalia Ordinance That Licenses Items Which Are "Designed or Marketed for Use with Illegal Cannabis or Drugs" Is a Valid and Constitutional Enactment.

Hoffman Estates is an Illinois home rule community of 38,000. This ordinance was drafted in February, 1978 before any published opinions on drug paraphernalia had been issued. At the broad direction of the Village Board, the Village Attorney wrote it as a licensing ordinance to avoid the stricter scrutiny of a criminal prohibition and to minimize the intrusion of the necessary regulation to cope with a most serious problem (JA 55).

In the history of this litigation, it was recognized by Appellant, Village of Hoffman Estates ("Village") and Appellee, Flipside, Inc. ("Flipside") as well as the United States District Court and Seventh Circuit Court of Appeals that the *Grayned* v. *City of Rockford,* 408 U. S. 104, 92 S. Ct. 2294 (1972) standard applied to the issue of vagueness.

This standard has also been deemed settled by this Court when it cited *Grayned* and predecessor cases in *Smith* v. *Goguen,* 415 U. S. 566, 94 S. Ct. 1242 (1974) and said in regard to the due process doctrine of vagueness:

> "The settled principles of that doctrine require no extensive restatement here. The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement."

The *Grayned* standard upon which the Seventh Circuit issued their opinion and upon which this argument is framed is as stated by this Court at 408 U. S. 104, 108-09, 92 S. Ct. 2294, 2298-99 as follows:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

A. The Ordinance provides sufficient warning to avoid that which is forbidden.

1. Standard of Review of "sufficient warning".

Significant issues in reviewing the standard of "sufficient warning" are: 1) how stringent a requirement is required, and 2) to whom is the "sufficient warning" directed.

The ordinance herein is a licensing ordinance upon the retailer and civil in nature. It is recognized that the Due Process Clause of the Fourteenth Amendment to the United States Constitution applies to both civil and criminal matters.

This Court, in *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 45 S. Ct. 295 (1925) found that whether portions of the Lever Act were civil or criminal, they were subject to the exaction of obedience to a vague or indefinite rule. Further, this Court said in relation to a civil provision of the Immigration Act in *Jordan* v. *DeGeorge*, 341 U. S. 223, 230-31, 71 S. Ct. 703, 707 (1951):

> "This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations

> of due process of law. . . . Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine of this case. We do this in view of the grave nature of deportation."

This language would seem to imply that if the regulation was not "grave", the Court would not examine the statute. This implication is remedied by the clear language in *Giaccio* v. *State of Pennsylvania,* 382 U. S. 399, 86 S. Ct. 518 (1966) wherein a civil statute that assessed court costs with a total lack of standards was examined. The Court said at 382 U. S. 399, 402, 86 S. Ct. 518, 520:

> "Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague."

That the Due Process Clause applies to civil regulation appears settled, but as stated above, how stringent a requirement is required or what due process is due is an important issue. An answer was supplied in *Barenblatt* v. *United States,* 360 U. S. 109, 137, 79 S. Ct. 1081, 1098 (1959) wherein it was stated:

> "It goes without saying that a law to be valid must be clear enough to make its commands understandable. For obvious reasons, the standard of certainty required in criminal statutes is more exacting than in noncriminal statutes. This is simply because it would be unthinkable to convict a man for violating a law he could not understand. This Court has recognized that the stricter standard is as much required in criminal contempt cases as in all other criminal cases, and has emphasized that the "vice of vagueness" is especially pernicious where legislative power over an area involving speech, press, petition and assembly is involved."

The United States District Court in the instant case found that the Village's ordinance was not overbroad and did not regulate areas protected by the First Amendment and that it was not a criminal ordinance (Juris. St. 42a) and, therefore, the more stringent requirements were not applied. The Seventh Circuit Court of Appeals did not reach the overbreadth issue since it found the ordinance unconstitutional on vagueness grounds.

Further, less stringent requirements have been applied in vagueness cases dealing with economic regulation. E.g. *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 83 S. Ct. 594 (1963), dealing with the Robinson-Patman Act; and see *Smith* v. *Goguen*, 415 U. S. 566, 94 S. Ct. 1242 (1974), footnote 10. Also supportive to the less stringent test by negative implication are cases calling for a greater degree of precision when a statute defines criminal offenses or impinges on activities protected by the First Amendment, *Hynes* v. *Mayor and Council of Borough of Oradell*, 425 U. S. 610, 620, 96 S. Ct. 1755, 1760 (1976); *Winters* v. *New York*, 333 U. S. 507, 515, 68 S. Ct. 665, 670 (1948).

As to whom the "sufficient warning" is directed, it is settled that, absent an intrusion upon fundamental constitutional liberties, vagueness challenges to statutes must be examined strictly on the basis of the statute's application to the particular facts at hand. *United States* v. *Powell*, 423 U. S. 87, 96 S. Ct. 316 (1975); *United States* v. *Mazurie*, 419 U. S. 544, 95 S. Ct. 710 (1975).

The facts at hand are that a retailer of certain items questions whether an ordinance provides a sufficient warning. The law here does not apply to a manufacturer or a consumer but only a retailer. It is at this point that the language of *McGowan* v. *Maryland*, 366 U. S. 420, 81 S. Ct. 1101 (1961) must be taken into consideration. The Court said at 366 U. S. 420, 428-429, 81 S. Ct. 1101, 1106:

> "We believe that business people of ordinary intelligence in the position of appellant's employer would be able to know what exceptions are encompassed by the Statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county . . ."

It is argued that the *McGowan* case is controlling, and the law is good law and has not changed since the opinion was written by Chief Justice Warren in 1961.

Therefore, in the Village's case herein, persons in the industry which is to be regulated will know what items are designed for marijuana use and what items are designed for regular tobacco, either through their own expertise or by making reasonable investigations.

Under the *McGowan* theory, and the less stringent examination of a licensing ordinance, the ordinance does provide sufficient notice to the retailer of the mischief intended to be remedied.

It is settled that the law must be clear to the "average man" or to "men of common intelligence", and that the rule should be more properly qualified to require fair warning to those potentially subject to it. For example, if a penal statute is addressed to those in a particular trade or business, the terms used in the statute should be sufficiently defined to enable one in that trade or business to apply it correctly. This Court first recognized this application of the rule in *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 45 S. Ct. 141 (1925), where the court upheld the constitutionality of a law prohibiting the sale of falsely labeled kosher meats. In the next term, they generalized the rule in *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 127 (1926) and stated in relation to a minimum wage statute directed at employers:

> ". . . it will be enough for present purposes to say generally that the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they

employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them . . ."

It seems superfluous to state, but nonetheless necessary, that the Court in applying a "sufficient warning" standard that is less stringent must as well be mindful of the duty to seek an interpretation which supports constitutionality of legislation, *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 53 S. Ct. 620 (1933) (Justice Cardozo); see also *Aptheker* v. *Sec. of State*, 278 U. S. 500, 84 S. Ct. 1659 (1964).

2. "Sufficient warning" is provided by words "designed for use" and "marketed for use".

Many statutes are inherently vague, since "in most English words and phrases there lurk uncertainties". *Robinson* v. *United States*, 324 U. S. 282, 286, 65 S. Ct. 666, 668 (1945). In *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340, 72 S. Ct. 329, 330, 331 (1952), this Court observed that:

> "Few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

The Court below recognized the less stringent standard but found the ordinance still failed. They said at Jurisdictional Statement 20a:

> "Despite the fact that 'in the field of regulatory statutes governing business activities where the acts limited are in a narrow category, greater leeway is allowed,' *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 162 (1972), this ordinance fails to satisfy the principles behind the vagueness doctrine."

In the present case, this Court should find that the ordinance meets constitutional muster if a person of common intelligence engaged in the business of selling the type of merchandise regulated by the ordinance could examine the ordinance and not be confused by its requirements. The trial Judge in this case found that Flipside, by its conduct, indicated its understanding of the ordinance by removing 72 items from its shelves that were entered as Exhibits (Juris. St. 39a).

The words "designed for use" are not new words in statutes, e.g. 18 U. S. C. 1706, but those words in the drug paraphernalia usage context have been interpreted by three Circuits of the United States Courts of Appeal in the past year with differing conclusions. The three cases are: *Record Revolution No. 6, Inc.* v. *City of Parma,* 638 F. 2d 916 (6th Cir.—1980), vacated and remanded, 49 U. S. L. W. 3882 (May 26, 1981); *Hejira Corp. d/b/a Budget Records & Tapes, Inc.* v. *J. D. McFarlane,* No. 80-2062, May 5, 1981, ____ F. 2d ____ (10th Cir.—1981); *The Casbah, Inc.* v. *Thone,* 80-2033, June 8, 1981, ____ F. 2d ____ (8th Cir.—1981).

The three cases were based upon what is known as the Drug Enforcement Agency Model Act, a model prepared eighteen months after the Village's passage of its ordinance purportedly to assist states and municipalities in combatting the glamourization of drug use (see: Corwin, *Anti-Drug Paraphernalia Laws: Void for Vagueness?* 61 Boston University Law Review 453 (1981) for discussion of the industry and the DEA Model Act). The *Parma* Court invalidated the term "designed for use" by finding no intent or scienter element is incorporated in the language, 638 F. 2d 916, 930. The *Hejira* Court found that "designed" had a clear meaning indicating the item was predetermined for a particular use, Slip Opinion 80-2062 at p. 11. They specifically upheld the term and distinguished the language from *Parma* in that the Colorado statute was written in the conjunctive and required that the item be "designed and intended" and, therefore, the term "designed" was no longer

vague even as it applied to possessor or seller, Slip Opinion 80-2062 at p. 23. The *Casbah* Court rejected the reasoning of the *Parma* Court finding the term "designed for use" not vague over Casbah's claim that it, not being responsible for the design, cannot be liable under a theory of transferred intent. The Court said: "We cannot agree that the term 'designed' refers to the structure of an object." Slip Opinion 80-2033, p. 14. They found that the comments to the Model Act expressly stated that the items are innocent until coupled with the intentional act of design. In accord with this view are four United States District Court opinions: *New England Accessories Trade Association, Inc.* v. *Browne,* 502 F. Supp. 1245 at 1251 (D. Conn.—1980); *Mid-Atlantic Accessories Trade Association* v. *Maryland,* 500 F. Supp. 834 at 844-45 (D. Md.—1980); *Delaware Accessories Trade Association* v. *Gebelein,* 497 F. Supp. 289 at 291-92 (D. Del.—1980); *Brache* v. *County of Westchester,* 507 F. Supp. 566 at 577 (S. D. NY—1981).

Specifically, Judge Harvey said in the *Maryland* case, " 'Design' connotes an intentional act as well as an objective set of characteristics. When considered in the context of this statute, it is clear that it is the subjective, intentional sense in which 'designed' is used." 500 F. Supp. 834 at 844.

The Court below made no attempt whatsoever to apply such reasoning to the words "designed for use" even though the Maryland case was submitted prior to its opinion. They did not discuss or distinguish the *Screws* requirement that the presence of a specific intent standard saves what otherwise might be a vague statute *and* that such a standard ought to be read into a law where possible to preserve its constitutionality. *Screws* v. *United States,* 325 U. S. 91, 65 S. Ct. 1031 (1945). The Court below found that items "designed for use with drugs" could only apply to the manufacturer (Juris. St. 17a) and makes no further discussion of transferred intent or the type of logic used by the District Courts cited above.

Sellers cannot ostrich-like ignore the consequences of their intent and make illogical denials of what persons of common

intelligence know. The owner of Flipside, Lawrence Rosenbaum, testified he sold rolling papers, pipes, jewelry (JA 42-44) but because of the ordinance, the store may "cease to exist" without that profit (JA 45) implying from his view, that these items at his record store are mere tobacco accessories and the tobacco accessory business must be good. He refused to acknowledge he was selling drug related paraphernalia (JA 46). This is not unlike the analogy made over 40 years ago in the Fourth Circuit:

> "To say that the sale of goods is a normally lawful transaction is beside the point. . . . One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of a felony. In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assistance by refusing to make the sale." *Backun* v. *United States,* 112 F. 2d 635 at 637 (4th Cir.—1940).

It is urged the Court specifically consider the Village's phrase "designed for use" in conjunction with the Courts of Appeal and District Court rulings as the finding here will be significant in relation to the many Model Act state statutes that employ this language.

The second phrase questioned by the Court below was "marketed for use" with illegal drugs. It was recognized by the District Court and stated in Flipside's Motion to Affirm filed with the Court that "the intended impact of the ordinance was shown instead to be a merchant's 'manner of marketing' " (Motion to Affirm, p. 5). The guidelines for enforcement clearly indicate that the manner of marketing would be scrutinized (JA 14). Because the ordinance is a licensing law aimed

at retailers only and not a law creating criminal penalties to possessors, manufacturers or retailers, Flipside's offer of evidence at trial and argument (Motion to Affirm, p. 12, f. n. 2) that identical merchandise sold in different stores will be unscathed in one and condemned in another is irrelevant. The second "Whereas" of the subject ordinance recognizes that the "items" are legal retail items (JA 10). This offer of evidence and argument is made consistently in Model Act cases and has relevancy there since the Model Act makes it a crime to possess such items. Examples of this are: *Record Revolution No. 6* v. *City of Parma*, 638 F. 2d at 931, "Detective Rutt would arrest a retailer operating a 'head shop' if it sold alligator clips or cigarette papers, but not a drug store owner selling the same items."; *Mid-Atlantic Accessories Trade Association* v. *State of Maryland*, 500 F. Supp. at 846-349:

> "Unquestionably, there are items which are drug paraphernalia but which likewise may have innocent uses. But the innocent uses are not so related that the same array of items could reasonably be expected to be found in the same store unless the intention was that they be used as drug paraphernalia. For instance, an alligator clip, scales and a pipe might logically be sold together in one store catering to the drug trade, but would hardly all be sold together in a store catering to customers who might want to use these items innocently. . . . As a part of their case, plaintiffs presented the testimony of one Robert De Grazia, an ex-police chief, who purported, as an expert, to support the proposition that police could not be trained to enforce SB 63 evenhandedly.";

See also, *World Imports* v. *Woodbridge Township*, at 493 F. Supp. 430, 431 (D. NJ—1980); *Brache* v. *County of Westchester*, 507 F. Supp. 579, 580 (S. D. NY—1981) wherein the Court found Deputy Commissioner Fulgenzi's testimony virtually identical to Detective Rutt's in *Parma:*

> "Perhaps most revealing was Commissioner Fulgenzi's position that at some point a store becomes so saturated with 'head shop' items that sale or display of virtually any

> dual-use or multi-use product would constitute a crime. . . . When, however, a book section was added with 100 book titles, including *The Marijuana Grower's Guide* and *The Cocaine Consumer's Handbook*, the store had 'definitely' crossed the line. But, if the store were larger and the scale were moved to a jewelry section, you might be safe."

Admittedly, this testimony is not unlike the testimony in the instant case including the Police Chief's stipulation (JA 33).

The point that makes this testimony irrelevant to the issue is that the ordinance's marketing concept is not aimed at the items per se, but the presumed knowledge that said items will be used with illegal drugs. There *is no* rational basis to believe that a hardware dealer intends the alligator clips he sells are to be used with illegal drugs, but there *is* a rational basis to believe that a retailer who sells alligator clips amongst rolling papers, exotic pipes and the like intends or has knowledge they will be used with illegal drugs. Long before the advertising and marketing industry became what it is today, it was recognized that the peculiar arrangement of a large number of suspected objects may be relevant factors as to their intended use. *Israel* v. *United States*, 63 F. 2d 345, 346 (3rd Cir.—1933).

Judicial notice of marketing techniques in the drug paraphernalia industry has been taken. Those establishments that exercise such techniques are known as "head shops". Citing Fed. R. Evid. 201 Judge Debevoise in *Record Museum* v. *Lawrence Township*, 481 F. Supp. 768, 771 (D. N. J.—1979) said:

> "Further, plaintiff's own evidence establishes that in addition to their many innocent and beneficient uses, syringes, needles, eye droppers, spoons, "bongs" or other pipes, testing kits, roach clips and rolling papers are sometimes the means used for taking drugs and collectively are to many the symbol and mark of the drug culture. It is not without significance that retail establishments which sell these items as a distinct line of trade are commonly known as 'head shops'."

The ordinance herein applies to any and all retailers but those who specifically market items with knowledge that they are most likely to be used with illegal drugs are likely to be the "head shops". This is no different than the fact that retailers who must obtain a license to sell milk will most likely be dairy stores, convenience stores and grocery stores.

Judge Debevoise had a second opportunity to review a drug paraphernalia law (having found the Lawrence Township ordinance vague) and expanded his remarks. He said in *World Imports* v. *Woodridge Township*, 493 F. Supp. 428, 431 (D. N. J.—1980):

> "A number of retail stores commonly called head shops specialize in selling drug paraphernalia. Only the naive or duplicitous would contend that sales of drug paraphernalia by head shops are intended primarily for such innocent purposes as making a lamp from a water pipe, fashioning an article of personal adornment from a coke spoon, or feeding wounded birds with syringes and eyedroppers. The purpose of a head shop is to capitalize upon, to perpetuate and to augment the current interest, particularly among the young, in items which are obviously intended for use with illegal drugs."

The "marketed for use" phrase was based upon the standards of presumption stated in *Leary* v. *United States*, 395 U. S. 6, 36, 89 S. Ct. 1532, 1548 (1969) that there is a "rational connection" between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is "more likely than not to flow from" the former. This ordinance being a civil regulation rather than a criminal law, the unsuccessful argument such as that made in the criminal case of *County Court of Ulster County* v. *Allen*, 442 U. S. 140, 99 S. Ct. 2213 (1979) that the "more likely than not" standard violated due process of law is not applicable. It is recognized that the *Leary* case involved statutory presumptions and that presumption is not written into the subject ordinance in so many words as in *Leary*,

but the *Leary* language has been cited as the test for constitutionality of criminal law inferences in general. *Barnes* v. *United States*, 412 U. S. 837, 842, 93 S. Ct. 2357, 2361 (1973). It is indeed possible that an item marketed in the manner stated by the ordinance may be used innocently but the Court has never required that a presumption be accurate in every imaginable case, *Leary* v. *United States*, 395 U. S. 6, 53, 89 S. Ct. 1532, 1557.

This case in relation to the term "marketed for use" differs from Model Act cases since it is not the items that are presumed at the outset to be subject to the licensing ("we agree with the District Court that the listed items are not presumed to be drug paraphernalia", *Record Revolution No. 6* v. *City of Parma*, 638 F. 2d 916, 932) but the items when marketed in such manner that a retailer of common intelligence would have knowledge that such items are more likely than not to be used with illegal drugs.

The Court below summarily rejected the offer of the "fact proved", the manner of marketing (Juris. St. 18a), and therefore, did not reach the issue of the "fact presumed", the use of such marketed items with drugs. This rejection ignores the reality of life in the 1980's, the reality of the existence of the drug paraphernalia industry, the reality of the marketing and advertising industry, and the findings of other courts, as above, in relation to this industry and retailers in particular. The District Court found that the guidelines gave clear standards as to the marketing intent making the *Leary* presumption even "stronger" (Juris. St. 40a).

3. The phrases "designed for use" and "marketed for use" connote the requisite scienter required.

Some of the Drug Enforcement Agency Model Act cases have been decided upon the issue of scienter as scienter may save a statute from vagueness by providing fair notice of proscribed conduct and by distinguishing lawful from unlawful

conduct, *(Record Revolution No. 6* v. *City of Parma,* 638 F. 2d at 934), but as recognized in that case, it is not a term or finding that would avoid a vagueness problem in all cases.

Circuit Judge Henley in *The Casbah, Inc.* v. *Thone,* 80-2033 at 9 (8th Cir.—1981) first stated:

> "Two considerations are basic to our decision on the merits. The first is our belief that we are empowered to articulate the meaning of the drug paraphernalia statute in a manner which supports a finding of constitutionality. The second is our conclusion that the element of intent saves the Nebraska statute from unconstitutional vagueness. On each matter, after careful consideration, we reach a different conclusion from that of the Sixth Circuit, the only other Court of Appeals to have considered the Model Act."

and then adopted the "cogent reasoning" of *Delaware Trade Accessories* v. *Gebelein,* 497 F. Supp. 289 (D. Del.—1980), 80-2033 at 17-18:

> "So-called *constructive knowledge* thus has significance *only* in a situation where the defendant is *selling or delivering* items that he intends to be used to produce or consume illicit drugs in the first place. The legitimate merchant who sells innocuous items need make no judgment about the purpose of the Buyer based upon the surrounding circumstances. The dealer, on the other hand, who sells innocuous items with the intent that they be used with drugs is, in effect, put on notice by the illicit nature of his activity that he must be careful to conform his conduct to the law. Even the illicit dealer, however, is not held legally responsible, as plaintiffs would suggest, for guessing what is in the mind of the buyer. The seller is safe as long as he does not acutally know the buyer's purpose and as long as the objective facts that are there for him to observe do not give fair notice that illegal use will ensue."
> (emphasis added)

It is precisely the significance of the situation cited that permits the constructive knowledge.

The Village ordinance deals only with the merchant and places no responsibility upon the merchant to know the buyer's intent as was the concern in the Delaware and Nebraska cases, both of which upheld the Model Act.

As argued above, "design" connotes an intentional act and "marketed for use" clearly requires a scienter element to carry the *Leary* presumption. The terms are disjunctive and each would place the burden of proof upon the Village to prove the scienter or knowledge of the retailer. Constructive knowledge must be read into the ordinance since its terms connote knowledge and intent.

B. The Ordinance provides adequate guidelines to prevent arbitrary and discriminatory enforcement.

The second branch of the *Grayned* standard calls for explicit standards of enforcement. It has long been recognized that the law-making function shall not be delegated to the whim of the policeman on the beat or the predilections of the prosecutor.

This Court was very clear when it stated the need for standards in *Giaccio* v. *State of Pennsylvania,* 382 U. S. 399, 403, 86 S. Ct. 518, 521 (1966):

> "The Act, without imposing a single condition, limitation or contingency on a jury which has acquitted a defendant simply says the jurors 'shall determine, by their verdict, whether [etc.] . . . Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce."

The argument is restated that the scrutiny to be given civil commercial behavior guidelines and standards is, to some degree, less than that given to criminal noncommercial behavior. This Court said in *Smith* v. Goguen, 415, U. S. 566, 574, 94 S. Ct. 1242, 1248 (1974):

> "We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principle element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies." (emphasis added)

The Village's guidelines were given great weight by the District Court leading the Court to find that reading the ordinance and guidelines together results in a conclusion that the operative words of the ordinance were not vague (Juris. St. 39a). Further, there existed in the Village, as with the Federal Government and most states, an Administrative Procedures Act (JA 20-24) for the purpose of setting more specific regulatory standards which was referenced in Section E of the ordinance (JA 11) and discussed in the testimony at JA 68. The District Court found this of importance (Juris. St. 39a). The Seventh Circuit Court of Appeals, however, was not impressed as any rule-making would be "speculative" (Juris. St. 26a). It must be noted that Flipside's initial complaint was filed during the first month of the ordinance's effect (JA 9 & 12) and before any licensee had applied for a license. Nonetheless, until it was necessary to provide standards, preliminary guidelines were promulgated by the Village Attorney (JA 14 and discussion at 79 and 68 to 73). These guidelines were issued eighteen months prior to the Drug Enforcement Agency Model Act and guidelines. The Model Act guidelines (e.g. *Mid-Atlantic Accessories Trade* v. *State of Maryland,* 500 F. Supp. at 838) contain guidelines to assist in identifying a possessor or manufacturer but as to a retailer, they include among others "(9) the manner in which the object is displayed for sale", "(12) the existence and scope of legitimate uses for the object in the community" and "(7) descriptive materials accompanying the object which explain or depict its use". The similarities to the Village's

guidelines are apparent and both promulgations of guidelines are based upon logically relevant factors to give notice to the retailer of the manner of marketing and design with which the ordinance is concerned.

The presence of guidelines, as in the Model Act, caused the New Jersey District Court to comment that the Model Act is significantly different than prior ordinances since it listed "indicia to aid a court or other authority in determining whether an object is drug paraphernalia. Persons of common intelligence should be able to ascertain whether under all the circumstances an object is or is not drug paraphernalia under ordinance". *World Imports, Inc.* v. *Woodbridge Township,* 481 F. Supp. 428 at 432.

A cursory reading of the seemingly myriad number of cases (see Juris. St. 51a-52a) finds the Courts bogged down in sorting out testimony regarding sizes of "cocaine spoons", meerschaum pipes, scales and the like. The Village's ordinance and guidelines avoid the "close case" situation and simply place the test primarily on the retailer's manner of marketing and permit the retailer to make the choice of his livelihood subject only to a license and control of minors in the same way one who chooses to operate a tobacco store must obtain a license and limit sales to minors and one who chooses to operate a tavern must obtain a license and limit sales to minors.

This Court in *United States* v. *Petrillo,* 332 U. S. 1, 7; 67 S. Ct. 1538, 1541 (1947) said:

> "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. ... The constitution does not require impossible standards.

It is abundantly clear that the Hoffman Estates ordinance, Guidelines and Administrative Procedures Act provide retailers with a rough idea of fairness.

CONCLUSION

The Judgment of the Seventh Circuit Court of Appeals, insofar as it reversed the decision of the United States District Court, should be reversed.

Respectfully submitted,

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No. 80-1681

In the
Supreme Court of the United States
October Term, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, et al.,
Appellants.

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation,
Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit.

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals Correctly Found the Hoffman Estates Ordinance and Accompanying Guidelines Unconstitutional For Vagueness Because They Fail to Provide Sufficient Notice to Merchants or Sufficient Guidelines for Enforcement and Adjudication?

A. Whether the Hoffman Estates Ordinance Exhibits Extreme Potential for Abuse, Infringes Upon First Amendment Rights, and, Therefore, Should Be Subjected to a Stringent Standard of Review?

B. Whether the Ordinance and Guidelines Fail to Adequately Apprise Merchants of Which Items Or Manner Of Display Will Initiate Enforcement?

C. Whether the Hoffman Estates Scheme Countenances Arbitrary and Discriminatory Enforcement By Failing to Provide Explicit Standards to Those Entrusted to Enforce the Law?

II. Whether the Hoffman Estates Scheme is a Strict Liability System and, Therefore, The Merchant's State Of Mind Is Irrelevant.

III. Whether, Assuming *In Arguendo* The Ordinance Requires An Intent Element, When the Subject Matter of the Ordinance Is Not Susceptible to Reasonable Clarity, an Intent Requirement Cannot Cure the Underlying Vagueness?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Authorities	iv
Constitutional Provisions, Ordinances and License Guidelines Involved	xi
Prefatory Note	1
Summary of Argument	9
Statement of the Case	11
Argument:	22
I. The Court Of Appeals Correctly Found The Hoffman Estates Ordinance and Accompanying Guidelines Unconstitutional for Vagueness Because They Fail To Provide Sufficient Notice To Merchants Or Sufficient Guidelines For Enforcement And Adjudication	22
A. The Hoffman Estates Ordinance Exhibits Extreme Potential for Abuse, Infringes Upon First Amendment Rights, And, Therefore, Should Be Subjected To A Stringent Standard Of Review	22
B. The Ordinance And Guidelines Fail To Adequately Apprise Merchants Of Which Items Or Manner Of Display Will Initiate Enforcement	28
C. The Hoffman Estates Scheme Countenances Arbitrary And Discriminatory Enforcement By Failing To Provide Explicit Standards To Those Entrusted To Enforce The Law	38
II. The Hoffman Estates Scheme Is A Strict Liability System And, Therefore, The Merchant's State Of Mind Is Irrelevant	42

PAGE

III. Assuming *In Arguendo* The Ordinance Requires An Intent Element, When The Subject Matter Of An Ordinance Is Not Susceptible To Reasonable Clarity, An Intent Requirement Cannot Cure The Underlying Vagueness 48

Conclusion 56

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CASES:

Backdoor Records v. *City of Jacksonville*, 515 F. Supp. 857 (E.D. A.K. 1981) 46

Bambu Sales, Inc. v. *Gibson*, 474 F.Supp. 1297 (D. N.J. 1979) 9

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) 25

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 26

Bence v. *Breler*, 501 F.2d 1185 (7th Cir. 1974), cert. denied 419 U.S. 1121 (1975) 28, 53

Benton v. *United States*, 232 F.2d 341 (D.C. Cir. 1956 ..... 3, 4

Blackmon v. *Brotherhood Protective Order of Elks*, 232 Ga. 671 (1974) 2

Borgia v. *United States*, 78 F.2d 550 (9th Cir. 1935) .. 7

Boyce Motor Lines v. *United States*, 342 U.S. 339 (1952) 48, 49, 51, 52

Casbah, Inc. v. *Thone*, ... F.2d ..... (No. 80-2033 8th Cir. June 8, 1981) 45

Casias v. *Patterson*, 398 F.2d 486 (10th Cir. 1968) 2

Caulotti v. *Franklin*, 439 U.S. 379 (1979) 49

Chapman v. *United States*, 271 F.2d 593 (5th Cir. 1959) 7

PAGE

Cole v. *State*, 511 P.2d 593 (Okl. Cr. App. 1973) 30

Commonwealth v. *Fassnacht*, 369 A.2d 800 (Pa. Super. 1977) 2

Commonwealth v. *Jones*, 343 N.E.2d 172, 33 A.L.R.3d 788 (Mass. 1979) 3

Commonwealth v. *Morgan*, 401 A.2d 1182 (Pa.Super. 1979) 4

Danovitz v. *United States*, 281 U.S. 389 (1930) 7, 8

Davis v. *Fowler*, 504 F. Supp. 502 (D. Md. 1980) 2

DeHart v. *United States*, 237 F.2d 227 (4th Cir. 1956) 7

Eucalyptus Records, Etc. v. *James*, No. C-81-402-RJM (E.D. Wash. July 21, 1981) 45

Feitler v. *United States*, 34 F.2d 30 (3rd Cir. 1979) 7, 8

The Flipside, Etc. v. *Village of Hoffman Estates*, 639 F.2d 373 (7th Cir. 1981) .....passim

The Flipside, Etc. v. *Village of Hoffman Estates*, 485 F.Supp. 400 (N.D. Ill. 1980) 28

Florida Businessmen for Free Enterprise v. *City of Hollywood*, 648 F.2d 956 (5th Cir. 1981) 45

Gaffrey v. *Babb*, 50 Or.App. 617, 624 P.2d 616 (1981) Petition for review denied, No. 27709 (Or. June 16, 1971) 5, 46, 54

Geiger v. *City of Eagan*, 618 F.2d 26 (8th Cir. 1980) 27, 30, 34, 55

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 28, 40, 48, 53, 54

Green v. *District of Columbia*, 91 A.2d 712 (D.C. Ct. App. 1952) 3

Gregory v. *Chicago*, 394 U.S. 111 (1969) 39

PAGE

Hawthorne v. *United States*, 37 F.2d 316 (4th Cir. 1930) 6

Hejira Corporation v. *MacFarlane*, ... 2d ....., No. 80-2062 (10th Cir. May 5, 1981) 46

Hilbers v. *Municipality of Archorage*, 611 P.2d 31 (Alaska Sup. Ct. 1980) 24

Housworth v. *Glisson*, 485 F.Supp. 29 (N.D. Ga. 1978) aff'd 614 F.2d 1295 (5th Cir. 1980) 25

Indiana Chapter, N.O.R.N.M.L. v. *Sendak*, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980), vacated on appeal 631 F.2d 734 (7th Cir. 1980) 30, 31, 32, 45, 53

Information Management, Etc. v. *Borough of Pleasant Hills*, 512 F.Supp. 1066 (W.D. Pa. 1981) 46

Israel v. *United States*, 63 F.2d 345 (3rd Cir. 1933) .. 6

Johnson v. *United States*, 333 U.S. 10 (1948) 39

Jones v. *United States*, 11 F.2d 98 (4th Cir. 1926) 6

Kane v. *McDaniel*, 407 F.Supp. 1239 (W.D. Ky. 1975) 2

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963) ..23, 24

Lazy J., Ltd. v. *Borough of State College*, No. 80-1167 (M.D.Pa. Jan. 30, 1980) 46, 49, 53

Leary v. *United States*, 395 U.S. 6 (1969) ..27, 41, 42, 47

Linmark Associates, Inc. v. *Township of Willingboro*, 431 U.S. 85 (1977) 26

Magnani v. *City of Ames*, 493 F.Supp. 1003 (S.D. Iowa 1980) 30, 37, 53

Mayo v. *United States*, 413 F.Supp. 160 (E.D. Ill. 1976) 5

McGowan v. *Maryland*, 366 U.S. 420 (1961) 36, 37, 52

PAGE

Mid-Atlantic Accessories Trade Ass'n v. *State of Md.*, 500 F.Supp. 834 (D.Md. 1980) 43

Morisette v. *United States*, 342 U.S. 246 (1952) 24

Music Step, Inc. v. *City of Ferndale*, 488 F.2d 390 (E.D. Mich. 1980) 30, 37, 53

New England Accessories Trade Ass'n v. *Browne*, 502 F.Supp. 1245 (D. Conn. 1980) 43

New York Times Co. v. *United States*, 403 U.S. 713 (1971) 25

Nosowitz v. *United States*, 282 F. 575 (2nd Cir. 1922) 7

One 1958 Plymouth Sedan v. *Commonwealth of Pa.*, 380 U.S. 693 (1965) 1

Pamphlet v. *State*, 271 So.2d 403 (Miss. 1972) 3

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People v. *Clerk*, 68 Ill.App.3d 1021, 25 Ill. Dec. 359, 386 N.E.2d 630 (1979) 4

People v. *Spenser*, 10 Ill.App.3d 229, 294 N.E.2d 17 (1973) 4

People v. *Steskal*, 55 Ill.2d 157, 302 N.E.2d 321 (1973) 2

People v. *Zimmerman*, 44 Ill.App.3d 601, 358 N.E.2d 715 (1976) 2

Record Head v. *Sachen*, 498 F.Supp. 88 (E.D. Wisc. 1980) 46

Record Revolution No. 6 v. *Parma*, 638 F.2d 916 (6th Cir. 1980) 32, 33, 45, 55

Record Revolution No. 6 v. *Parma*, 492 F.Supp. 1157 (N.D. Ohio 1980) 34

Screws v. *United States*, 325 U.S. 91 (1945) ..48, 49, 50, 52

PAGE

Shelton v. *Tucker*, 364 U.S. 479 (1960) 26

Silbert v. *United States*, 289 F.Supp. 318 (D. Md. 1968) 2

Smith v. *Roark*, No. 80-2110 (S.D. W.Va., May 13, 1980) 32

Snead v. *United States*, 217 F.2d 912 (4th Cir. 1923) .. 7

Southeastern Promotions Ltd. v. *Conrad*, 420 U.S. 546 (1975) 25

Spence v. *Washington*, 413 U.S. 405 (1974) 26

Stanley v. *State*, 512 P.2d 829 (Okl. Cr. App. 1973) .. 4

State v. *Hart*, 200 Kan. 153, 434 P.2d 999 (1967) 4

State v. *Heitman*, 473 S.W.2d 722 (Mo. 1971) 3

State v. *Myott*, 246 N.W.2d 786 (S.D. 1976) 3

State v. *Olsen*, 43 Wn.2d 726 (1953) 3

State v. *Three ISO-2 Devices*, 296 N.W.2d 510 (S.D. 1980) 2, 47

State v. *West*, 18 Wash.App. 686, 571 N.W.2d 237 (1977) 4

Stroh Products Co. v. *Davis*, 8 F.2d 773 (E.D. Mich. 1925) 6

Stroud v. *United States*, 199 F.2d 923 (5th Cir. 1952) 7

Tinker v. *Des Moines*, 393 U.S. 503 (1969) 26

The Town Tobacconist v. *Degnan*, No. C-2198 80 (Super Ct. Ch. N.J. March 12, 1981) 48

United States v. *Baranski*, 484 F.2d 556 (7th Cir. 1973) 53

United States v. *Blast*, 495 F.2d 138, 161 U.S. App. D.C. 312 (D.C. Cir. 1974) 5

United States v. *Brunett*, 53 F.2d 219 (W.D. Mo. 1931) 6

PAGE

United States v. *Farrell*, 606 F.2d 1341 (D.C. Cir. 1979) 2

United States v. *Freed*, 401 U.S. 601 (1971) 47

United States v. *Jenison*, 484 F.Supp. 747 (D. R.I. 1980) 2

United States v. *McCormick*, 502 F.2d 281 (9th Cir. 1974) 2

United States v. *Nomel Products Co.*, 47 F.2d 575 (2nd Cir. 1931) 6

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United States v. *One 1972 Datsun*, 378 F.Supp. 1200 (D. N.H. 1974) 2

United States v. *2265 One-Gallon Paraffined Tin Cans*, 260 F.2d 105 (5th Cir. 1958) 7

United States v. *One Lot of Intoxicating Liquor*, 27 F.2d 903 (S.D. Texas 1928) 7

United States v. *Ragland*, 306 F.2d 732 (4th Cir. 1962) 7

United States v. *Roche*, 443 F.2d 98 (10th Cir. 1971) .. 47

United States v. *Scaglione*, 446 F.2d 182 (5th Cir.) cert. denied 404 U.S. 941 (1971) 5

United States v. *Schweihs*, 569 F.2d 965 (5th Cir. 1978) 5, 47

United States v. *Swindler*, 476 F.2d 167 (10th Cir.), cert. denied 414 U.S. 837 (1973) 47

United States v. *Three Trade Boosters*, 135 F. Supp. 24 (M.D. Pa. 1955) 5, 47

United States v. *Two "Exhibit Rotary" Coin Op., Etc.*, 107 F.Supp. 314 (W.D. Okl. 1952) 5, 47

United States v. *Zambito*, 315 F.2d 266 (4th Cir.), cert. denied 373 U.S. 924 (1963) 5

PAGE

Universal Amusement Co., Inc. v. *Vance*, 559 F.2d 1286 (5th Cir.1977) 3

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Vukich v. *United States*, 28 F.2d 666 (9th Cir. 1928) 7

Wakabayashi v. *Tooley*, No. 81 CV 6293, (Dist. Ct., City and Co. of Denver, Col., August 18, 1981) 46

Weiler v. *Carpenter*, 507 F.Supp. 837 (D. N.M. 1981) 46

Weinstein v. *United States*, 293 F. 388 (1st Cir. 1923) 6

Younger v. *Harris*, 401 U.S. 37 (1971) 38

Zwicker v. *Koota*, 389 U.S. 241 (1976) 25

STATUTES AND ORDINANCES:

Ordinance No. 969-1978 and License Guidelines for Items, Effect, Paraphernalia, Accessory or Thing Which is Designed or Marketed for Use With Illegal Drugs or Cannabis ..... *passim*

15 U.S.C. § 1171 ..... 5, 47

18 U.S.C. § 492 4

18 U.S.C. § 1792 47

18 U.S.C.§ 1953(a) 5

18 U.S.C. § 2512 ..... 5, 47

Ill. Rev. Stat. Ch. 38, §4-9 ..... 42, 48

LAW REVIEW AND TREATISES:

W. LaFave and A. Scott, *Handbook on Criminal Law* (1972) 51, 52

Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.Penn. D.Rev. 67 (1960) 53

33 A.L.R.3d 798, "Validity, Construction, and Application of Statutes Relating to Burglars' Tools" 4

CONSTITUTIONAL PROVISIONS, ORDINANCES, AND LICENSE GUIDELINES INVOLVED

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment, §1 to the United States Constitution states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORDINANCE NO. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

Now THEREFORE, BE ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

***Section 1*: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8-7-16, which additional section shall read as follows:**

Sec. 8-7-16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs	$150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper or colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of non-white paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1681

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, et al.,
Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation,
Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit.

BRIEF AND ARGUMENT FOR THE APPELLEE

PREFATORY NOTE

The Criminalization of Implements of Crime

In *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania,* 380 U.S. 693 (1965), this Court articulated a distinction between *derivative* contraband and contraband *per se* which has long been recognized in the law. This Court stated that contraband *per se* are "objects the possession of which, without more, constitutes a crime;" and that *derivative* contraband is lawful property "not intrinsically criminal in character," which be-

comes subject to legal restrictions only when a previous illegal use is established. *Id.* at 699-700. Numerous decisions by federal and state courts have drawn a similar distinction, and have required a substantial and concrete nexus between an otherwise innocent or neutral object and actual criminal activity involving the particular object before characterizing it as *derivative* contraband. *United States* v. *Farrell*, 606 F.2d 1341 (D.C. Cir. 1979); *United States* v. *McCormick*, 502 F.2d 281 (9th Cir. 1974); *Casias* v. *Patterson*, 398 F.2d 486 (10th Cir. 1968); *Davis* v. *Fowler*, 504 F.Supp. 502 (D. Md. 1980); *United States* v. *Jenison*, 484 F.Supp. 747 (D.R.I. 1980); *Kane* v. *McDaniel*, 407 F.Supp. 1239 (W.D. Ky. 1975); *United States* v. *One 1972 Datsun*, 378 F.Supp. 1200 (D.N.H. 1974); *Silbert* v. *United States*, 289 F. Supp. 318 (D. Md. 1968); *State* v. *Three ISO-2 Devices*, 296 N.W. 2d 510 (S.D. 1980); *Blackmon* v. *Brotherhood Protective Order of Elks*, 232 Ga. 671 (1974); *Commonwealth* v. *Fassnacht*, 369 A.2d 800 (Pa. Super. 1977); *People* v. *Steskal*, 55 Ill. 2d 157, 302 N.E. 2d 321 (1973); *People* v. *Zimmerman*, 44 Ill. App. 3d 601, 358 N.E. 2d 715 (1976). The *derivative* contraband/*per se* contraband distinction has been the conceptual underpinning of all laws which have attempted to attach penalties for the possession of instrumentalities of crime. Traditionally, the criminalization of "paraphernalia" has relied upon this distinction, and "paraphernalia" laws have historically been enforced only in one of two limited circumstances: either where an object is determined to be intrinsically well-suited for use in crime, having no significant lawful use and being readily distinguishable from objects not inherently sinister; or, where an object, otherwise lawful, has been found in an actual association with ongoing or consummated criminal activity.

Burglary tools have been treated as *derivative* contraband since it is commonly recognized that they are tools which are innocent of any association with crime until they have actually been put to use criminally. *See Benton* v. *United States*, 232 F.2d 341 (D.C. Cir. 1956); *Green* v. *District of Columbia*, 91 A.2d 712 (D.C. Ct. App. 1952); *cf. Universal Amusement Co., Inc.* v. *Vance*, 559 F.2d 1286, 1294 (5th Cir. 1977) ("jimmies" and "safecracking tools"). Laws making criminal the possession of burglary tools have been construed to require that an inherently innocent tool, such as a crow bar, has been connected with actual criminal activity. This *nexus* between the neutral tool and actual criminal activity is what establishes its status as *derivative* contraband, thereby permitting an inference of criminal intent. In only four situations has this *nexus* requirement been satisfied: where physical evidence directly connects a particular tool to a particular burglarious entry[1]; where the defendant and his tools are seized at or near to scene of a recent burglary[2]; where the defendant has sur-

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[1] *State* v. *Myott*, 246 N.W.2d 786 (S.D. 1976) (screwdriver linked to fresh pry marks on window); *State* v. *Heitman*, 473 S.W.2d 722 (Mo. 1971) (paint scrapings on crowbar); and *State* v. *Olsen*, 43 Wn.2d 726 (1953) (microscopic comparison of striations on sledgehammer and safe dial).

[2] *State* v. *Heitman*, 473 S.W.2d 722 (Mo. 1971) (defendant found with tools near burglary site shortly after burglary); *Commonwealth* v. *Jones*, 343 N.E.2d 172, 33 A.L.R.3d 788 (Mass. 1969) (tools found in an automobile in the vicinity of a recent burglary); *Cf., Pamphlet* v. *State*, 271 So.2d 403 (Miss. 1972) (numerous tools useful for burglary purposes, but no evidence of use in actual burglary, so evidence insufficient).

repticiously concealed the tools;[3] and where the defendant equipped with tools, is discovered trespassing and is unable to account for his presence or the tools' intended function.[4] Courts interpreting burglary tool statutes have noted that although certain tools could be used criminally for burglary purposes, the legitimate purposes for which such tools are ordinarily used prohibit any inference of inherent criminality. *People* v. *Spencer,* 10 Ill. App. 3d 229, 294 N.E. 2d 17 (1973); *Pamphlet* v. *State,* 271 So. 2d 403 (Miss. 1972); *Benton* v. *United States, supra.*

An examination of decisions by courts considering counterfeiting, gambling, and eavesdropping paraphernalia demonstrates that the *derivative* contraband/*per se* contraband formula has been adhered to faithfully. Under 18 U.S.C. §492, a printing press, if actually used to print counterfeit money, is subject to forfeiture as a form of

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[3] *People* v. *Borrero,* 26 N.Y.2d 430, 311 N.Y.S.2d 475, 259 N.E.2d 902 (1970) (defendants spotted walking away from automobile concealing a screwdriver); and *State* v. *Hart,* 200 Kan. 153, 434 P.2d 999 (1967) (sledgehammer concealed in topcoat).

[4] *Commonwealth* v. *Morgan,* 401 A.2d 1182 (Pa. Super. 1979) (defendant found trespassing on property while canvassing a house); *People* v. *Clerk,* 68 Ill. App. 3d 1021, 25 Ill. Dec. 359, 386 N.E.2d 630 (1979) (defendant found standing over victim after he unlawfully entered the house); *State* v. *West,* 18 Wash. App. 686, 571 N.W. 2d 237 (1977) (defendant found attempting to enter into back door of supermarket); *Stanley* v. *State,* 512 P.2d 829 (Okl.Cr. App. 1973) (defendant found in lumber yard with no explanation). For a more extensive annotation see 33 A.L.R.3d 798, "Validity, Construction, and Application of Statutes Relating to Burglars' Tools."

derivative contraband.[5] Under 18 U.S.C. §1953(a), proof of actual involvement of ordinary materials in an interstate gambling operation appears necessary for a violation[6]; but 15 U.S.C. §1171 requires proof of the inherent criminality of an object alleged to be a "gambling device"[7]. In a similar manner, 18 U.S.C. §2512 requires proof that a device is inherently useful for surrepticious interception by virtue of its design characteristics before it can be characterized as a communication intercepting device.[8]

Courts which have reviewed the quantum of evidence which justifies forfeiture of bootlegging implements or conviction for possession of devices or ingredients use-

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[5] *Mayo* v. *United States*, 413 F.Supp. 160, 161-62 (E.D. Ill. 1976) (government failed to prove object was used in prohibited manner, so evidence insufficient); *United States* v. *One Chief 1722 Offset Press*, 129 F.Supp. 276, 277 (D.Mass. 1955) (printing press discovered with illegal plates and counterfeit currency).

[6] *United States* v. *Scaglione*, 446 F.2d 182, 186-87 (5th Cir.), *cert. denied* 404 U.S. 941 (1971) (flash paper seen at situs of gambling operation); *United States* v. *Zambito*, 315 F.2d 266, 267 (4th Cir.) *cert. denied* 373 U.S. 924 (1963) (adding machine, numbers books, scrap paper involved in gambling operation). *See also Gaffey* v. *Babb*, 50 Or. App. 617, 624 P.2d. 616, 623 (1981) (Discussing ORS 167.132: "The pencil and paper used to make gambling records may have many purposes but *once pencil is applied to paper to make a record*, the use of the paper is narrowed to one purpose *i.e.*, records commonly used in a gambling sceme.")

[7] *United States* v. *Three Trade Boosters*, 135 F.Supp. 24, 27-28 (M.D. Pa. 1955); *United States* v. *Two "Exhibit Rotary" Coin Operated Gambling Devices*, 107 F.Supp. 314, 315 (W.D. Okl. 1952).

[8] *United States* v. *Schweihs*, 569 F.2d 965, 968-69 (5th Cir. 1978); *United States* v. *Blast*, 495 F.2d 138, 161 U.S. App. D.C. 312 (D.C. Cir. 1974).

ful in the illegal manufacture of distilled alcohol have focused their inquiries on two questions: (1). whether the object or substance at issue is inherently sinister *per se;* and, (2). whether the setting in which an innocent object or substance was discovered indicates a concrete *nexus* with criminal activity. These cases have invariably involved *precursors* of bootlegged alcohol, *e.g.,* copper tubing, sugar, yeast, malt, bottles, and corks, and not instruments potentially incidental to the *consumption* of alcoholic beverages, *e.g.,* shot glasses and beer mugs. The two-pronged inquiry has found its expression in two categories of decisions. In the first, the courts have noticed and discussed the sinister qualities of the particular item or substance at issue.[*] In the second, the courts have recognized the inherently innocent nature of the object or substance at issue, and therefore have evaluated the circumstances *extrinsic* to the neutral material to determine if a *nexus* with criminal activity is evidenced. Intent sufficient to justify conviction or for-

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[*] *See* e.g., *Israel* v. *United States,* 63 F.2d 345, 346 (3rd Cir. 1933) (copper boiler of unique construction); *United States* v. *Brunett,* 53 F.2d 219, 231-35 (W.D. Mo. 1931) ("inherent qualities of the preparation, compound and substance . . . peculiarly designed for unlawful use"); *United States* v. *Nomel Products Co.,* 47 F.2d 575, 577 (2nd Cir. 1931) (extract of ginger not *per se* fit for beverage purposes, so evidence insufficient); *Hawthorne* v. *United States,* 37 F.2d 316, 318 (4th Cir. 1930) (denatured alcohol has no alternative lawful use and is obvious precursor to beverage alcohol); *Jones* v. *United States,* 11 F.2d 98 (4th Cir. 1926) (denaturing chemical easily removable from denatured alcohol); *Stroh Products Co.* v. *Davis,* 8 F.2d 773, 777 (E.D. Mich. 1925) ("reasonable inference from the contituency of the preparation that it was designed for [illegal] purpose"); *Weinstein* v. *United States,* 293 F. 388, 389 (1st Cir. 1923) (three-gallon still designed for manufacture of intoxicating liquors).

feiture has been inferred in very limited circumstances which reliably establish the criminal involvement of the neutral object or material, such as the *actual* presence of illegal liquor at the scene where the material was discovered, inculpatory statements regarding the material by its owner, or the possession without explanation of huge quantities of liquor-making ingredients.[10]

In *Danovitz*, v. *United States*, 281 U.S. 389 (1930), this Court upheld the forfeiture of empty cans and

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[10] *See e.g., Danovitz* v. *United States*, 281 U.S. 389 (1930) *aff'g Feitler* v. *United States*, 34 F.2d 30 (3rd Cir. 1929) (bottles, corks, selling wire discovered with quantities of liquor and forged strip stamps); *United States* v. *Ragland*, 306 F.2d 732, 735 (4th Cir. 1962) (large quantity of sugar and written materials discussing the use of sugar in the manufacture of liquor); *Chapman* v. *United States*, 271 F.2d 593, 594 (5th Cir. 1959) (sugar, rye and yeast held to be precursors of illegal liquor because of the defendant's inculpatory statements and participation); *United States* v. *2265 One-Gallon Paraffined Tin Cans*, 260 F.2d 105, 107 n.1 (5th Cir. 1958) (inculpatory statements); *DeHart* v. *United States*, 237 F.2d 227 (4th Cir. 1956) (large quantity of sugar purchased under fictitious name; inculpatory statements by defendant); *Snead* v. *United States*, 217 F.2d 912 (4th Cir. 1923) (yeast and barley malt purchased under surrepticious circumstances, and claimant failed to proffer explanation); *Stroud* v. *United States*, 199 F.2d 923, 924 (5th Cir. 1952) (claimant seen transporting containers containing non-tax paid whiskey); *Borgia* v. *United States*, 78 F.2d 550 (9th Cir. 1935) (defendant linked to truck and precursors found at distillery); *Vukich* v. *United States*, 28 F.2d 666, 667 (9th Cir. 1928) (corn sugar found in defendant's car and at distillery); *United States* v. *One Lot of Intoxicating Liquor*, 27 F.2d 903 (S.D. Tx. 1928) (inculpatory statements and presence of whiskey); *cf. Nosowitz* v. *United States*, 282 F. 575 (2d Cir. 1922) (copper parts capable of many lawful purposes, so evidence insufficient).

bottles, corks, and other materials based on their being "offered for sale in such a *mode* as purposefully to attract purchasers who wanted them for unlawful manufacture. . ." (emphasis added) *Id.* at 397. The "mode" briefly alluded to by this Court is expanded upon the decision by the lower court in the same case, *sub nom. Feitler* v. *United States*, 34 F.2d 30 (3rd Cir. 1929). In *Feitler*, the Third Circut noted that quantities of illegal liquor, forged "strip stamps" bearing the names of distillers, and substances useful in adding flavor to a fermenting alcoholic beverage were displayed for sale with the empty containers, and other intrinsically lawful materials. The criminal *nexus* in that case was described by the court of appeals:

> [W]hen, not standing alone, [otherwise lawful articles] are assembled and put on sale *with clearly forbidden property*, they take on a new character and themselves become contraband because *intimately associated* with unlawful manufacture and *inseparably connected* with the sale of the unlawfully manufactured product. (emphasis added).

Id. at 33. Despite the implication in *Danovitz* that a mere assemblage of lawful items can sometimes be an illegal merchandising "mode," it is clear that the facts of that case established a definite *nexus* between lawful items and ongoing criminal activity. The actual presence of *per se* contraband (liquor) and the unique facts limit the holding in *Danovitz* to the situation there presented.

Unlike the traditional *derivative* contraband/*per se* contraband formula followed by prior criminalizations of ordinary, lawful objects (not inherently sinister), "drug paraphernalia" laws are peculiarly targeted against merchants, "manner of marketing," and innocent merchandise as commonplace as cigarette rolling papers, scales and

smoking pipes. In the drug-free commercial setting (*e.g.*, the retail business where items are displayed on shelves and under glass counters), a concrete *nexus* between an innocent item (*e.g.*, a pipe) and ongoing or consummated criminal activity (e.g., residue inside a pipe, or contemporaneous sale of drugs) cannot be constitutionally presumed. The variety of inherently innocent merchandise potentially subject to the restrictions and burdens of these laws is limitless, including everything potentially usable with drugs. Burdening lawful objects with the label of "instrumentality of crime" without first establishing the criminal *nexus* is unprecedented in the law and can find no support in the other forms of "paraphernalia" laws discussed herein. It is obvious that no merchant of crow bars or copper tubing could allege standing to challenge as facially vague a burglary tool statute or a bootlegging paraphernalia statute without first being subjected to prosecution. *See Bambu Sales, Inc.* v. *Gibson*, 474 F.Supp. 1297, 1305-6 (D.N.J. 1979). Because the essential ingredient of *nexus* is ignored in all recent efforts to ban or regulate items deemed drug-related, merchants of pipes and cigarette rolling papers suffer the threat of enforcement and, without exception, have been found to have standing to challenge these laws as vague on their face and as applied.

SUMMARY OF THE ARGUMENT

The Appellee first submits that the standard of review to be applied to the subject Ordinance should be a stringent one. Due to restraints on protected expression imposed by the Hoffman Estates Ordinance and Guidelines, a more probing and critical examination is warranted. Moreover, the Appellee contends that the penal nature and high potential for discriminatory en-

forcement and abuse militate in favor of the most stringent standard of review.

The Appellee primarily complains that the Ordinance is void for vagueness because it fails to satisfy the first due process requirement: that it give fair notice of its proscription to those expected to obey the enactment. The Seventh Circuit Court of Appeals properly recognized that neither the Ordinance nor the Guidelines provide ascertainable standards for merchants who must conform their conduct to the dictates of the law. The phrase "designed or marketed for use" fails to give fair notice.

The Appellee further submits that the Hoffman Estates scheme is so vague as to bestow almost total discretion upon police the officer on the beat, and leaves determinations of guilt to the speculation and perhaps prejudices of judges, juries and administrative tribunals. The enactment in question thus also fails to satisfy the second due process requirement: the requirement of explicit standards for those who must enforce the enactment.

The Appellee rejects the attempts of the Appellants to asserts for the first time the allegation that the Ordinance includes the requirement of a scienter element. The record and earlier writings of the Appellants, as well as the decision of the District Court clearly indicate that the subject of the litigation below is a strict liability system burdening an undefined class of physical objects. Assuming, *in arguendo,* that a scienter element might apply, the Appellee argues that the cosmetic addition of such an element is illusory and fails to ameliorate the facial vagueness inherent in the concept of punishing lawful items in the absence of a concrete connection between the items and actual criminal activity.

Finally, the Appellee submits that the Amici of Arkansas, *et al.*, and the Village of Wilmette are, in essence, requests for this Court to render advisory opinions in violation of Article III, §2 of the United States Constitution. The Amicus brief of the Community Action Against Drug Abuse is premised entirely upon presumptions patently controverted by the record below.

STATEMENT OF THE CASE

On February 20, 1978, the Village of Hoffman Estates Board of Trustees (Village) enacted Ordinance No. 969-1978, entitled "An Ordinance Amending the Municipal Code of the Village of Hoffman Estates By Providing for Regulation of Items Designed or Marketed for Use with Illegal Cannabis or Drugs." (Constitutional Provisions, Ordinances and License Guidelines Involved). Village President Virginia Hayter cast the deciding vote breaking the three to three tie vote in the Board of Trustees and thereby enacting the Ordinance. (J.A. 75). The preamble to the Ordinance acknowledged that its subject matter consists of legal retail items.

The subject ordinance acts as both a prohibition and a regulation of businesses that are deemed to come within the scope of the legislation. Section 1C prohibits the sale or gift of any item regarded as falling within the purview of the Ordinance to minors. The regulatory aspects of the Ordinance concern their sale to adults. The regulatory provisions require a business considered to be engaged in the retailing of things "designed or marketed for use with illegal cannabis or drugs" to obtain a special license. An applicant must pay a $150 dollar fee and provide affidavits establishing that every employee authorized to sell any of these "things" has never been convicted of a drug related offense. Section 1B, Section 2.

Once a businessman has succeeded in acquiring the license, the Ordinance requires that he maintain a police register memorializing the name and address of each purchaser, the date and time of sale, the name and quantity of the product, and the signature of the licensee or his agent. The police register must be kept available for police inspection during business hours, and must be retained for two years. Section 1D. A violation of the Ordinance is punishable by a fine of not less than $10 or more than $500, with each day that an alleged violation continues constituting a separate and distinct offense. (Section 3).

The Village almost contemporaneously issued "License Guidelines" intended to be read in conjunction with the ordinance and acknowledged to be critical to its interpretation. (J.A. 68, 69). The District Court found the License Guidelines to be an integral part of the Ordinance. (Juris. St. 33a). The License Guidelines assert that cigarette rolling paper of colorful design, cigarette rolling paper with names oriented for use with legal cannabis or drugs, and "roach clips," are automatically within the purview of the Ordinance. Pipes and "Paraphernalia" fall within the ambit of the Ordinance depending upon their "proximity" to non-white cigarette rolling papers, "roach clips," or literature deemed to encourage illegal use of cannabis or illegal drugs. (Constitutional Provisions, Ordinance, and License Guidelines Involved).

The evidence established that no experts or statistics were consulted by the Village to determine whether any relationship existed between the Ordinance and actual drug abuse in the community, what type of item is "designed or marketed for use with illegal cannabis or drugs," or whether there existed an objective basis for distin-

guishing between the burdened items and other concededly "lawful items" not regulated by the Ordinance. (J.A. 55, 56, 75; Preamble to the Ordinance). However, "studies" allegedly conducted by the Village led them to conclude that Flipside Records was the only merchandiser in Hoffman Estates that carried "that kind of merchandise." (J.A. 57, 58).

The Flipside, Hoffman Estates, Inc. (Flipside) is an Illinois corporation that owns and operates a business known as Flipside Records, located at 2348 West Higgins Road, Hoffman Estates, Illinois. Flipside Records opened its doors for business in June, 1976, and ever since has displayed and sold phonograph records, recording tape, clothing, decorative mirrors, jewelry, snuff, tobacco snuff and snuff accessories, and a variety of literature including "National Lampoon", "Rolling Stone", and "High Times." (Transcript, September 1, 1978—6, 7). Although some of the merchandise sold at Flipside Records could be considered to have had an unusual or outlandish appearance, every item had a recognized and lawful purpose. There were no provocative displays, tags, instructions or other merchandising techniques which suggested or encouraged an unlawful use for the shop's merchandise. (J.A. 42, 43).

Items that were small and fragile, and therefore susceptible to shoplifting or breakage, were kept in locked display cases near the cash register, and the assistance of a salesperson was required for purchase. (J.A. 43). Literature and periodicals were also displayed near the cash register because they were considered most effectively offered as a "point of purchase" or "impulse" item. (J.A. 43).

The evidence established that other merchants in Hoffman Estates sold and have continued to sell items functionally indistinguishable from those sold by Flipside without being considered subject to the Ordinance, e.g. Osco Drugs sells colored cigarette rolling papers, cigarette holders, pipes, and plastic squeeze bottles. (Plaintiff's Exhibits Numbers 26, 27, 63, 64, 65).

After the enactment of the Ordinance and License Guidelines, agents of the Village advised Flipside that it was subject to the Ordinance and that failure to comply would constitute a violation. (J.A. 70). Larry Rosenbaum, an officer of Flipside, telephoned Richard Williams, Hoffman Estates Village Attorney, and inquired what items were covered by the Ordinance. (J.A. 70). Mr. Rosenbaum was told that "[f]or his protection" it would be best to use the police register for every item sold in his store. (J.A. 70, 71). On advice of counsel, Flipside removed an extremely wide variety of merchandise, including literature, from its shelves and display cases. (J.A. 46, 47). The sole purpose of this mass removal was to avoid at all cost a violation and arrest which might have precluded Flipside from having access to a federal forum for the adjudication of its constitutional claims.

Flipside Records initiated proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, on May 30, 1978, seeking a declaratory judgment that the Ordinance violated the First, Fourth, Fifth, Eighth and Fourteenth Amendments, Article I, Section 8, Clause 3 and Article I, Section 10 of the United States Constitution pursuant to 42 U.S.C., Section 1983 and 28 U.S.C., Section 2201 and 2202; and further seeking temporary, preliminary and permanent injunctive relief and damages pursuant to 42 U.S.C.,

Section 1983 for the actions of the Village and its agents, under color of law, which caused Flipside Records to be deprived of rights secured to it by the United States Constitution.

On May 30, 1978, the Honorable George N. Leighton denied Flipside's emergency motion for a temporary restraining order.

On September 1, 1978, a hearing on Flipside's motion for preliminary injunction was held before Judge Leighton. (J.A. 38). Larry Rosenbaum, an officer of Flipside, testified that although Flipside was licensed to sell general merchandise, he was uncertain whether Flipside should be required to obtain the new special license pursuant to the Ordinance, and, if so, what items in his inventory must be recorded in the police register and preserved for police inspection. (Transcript, September 1, 1978—10; J.A. 46, 47). Mr. Rosenbaum testified that no information provided by the Village clarified the nature and scope of the burdens created by the Ordinance. (J.A. 44, 45). To Mr. Rosenbaum's knowledge there was no basis for a belief that colored cigarette rolling papers were designed for use with illegal substances. (J.A. 43). The word "proximity" was never defined for Mr. Rosenbaum. (J.A. 48). Mr. Rosenbaum testified that the removal of items from display was not intended to acknowledge that Flipside was engaged in retailing items designed or marketed for use with illegal cannabis or drugs. (J.A. 46, 48).

The Village called upon Police Officer Earl W. Maurer to testify. (J.A. 49). On direct examination, Officer Maurer testified that a "power hitter" is a plastic bottle used for smoking; that he has seen "roach clips" worn on people as items of jewelry and in "active use"; that whenever he had come in contact with "roach" clips and

"bomb [sic]" pipes analysis showed that cannabis had been smoked in them; that on one occasion analysis had shown that tobacco had been smoked in a "bomb [sic]" pipe; that he has seen marijuana cigarettes that had been "rolled"; and that he has never noticed simple white cigarette rolling papers being used by farmers in the community. (J.A. 51, 52, 53). On cross-examination Officer Maurer admitted he had read none of the literature displayed at Flipside and acknowledged that he was familiar with the expression "[y]ou can't tell a book by it's cover." (J.A. 53).

At the conclusion of the September 1, 1978 hearing, Judge Leighton denied Flipside's motion for preliminary injunction.

The trial for permanent injunction and declaratory judgment was held on March 23, 1979. Testimony was heard from Village Attorney Richard Williams, who drafted the Ordinance and License Guidelines, and Village President Virginia Hayter. (J.A. 60, 74).

Mr. Williams testified that althought he had never used a "roach" clip, he understood it to be an item that holds a hot burning cigarette so as to enable the smoker to get down to the last puff while avoiding the heat. (J.A. 58). Mr. Williams acknowleged that there are many methods to reduce the heat of a cigarette. (J.A. 59). After being shown a medical clamp (hemostat) and a device called an "Aquafilter," Mr. Williams explained his understanding of the Ordinance:

> If they market it with other items that the police tell me they have found in evidence with traces of cannabis and other items, then they are marketing it for use with marijuana.

(J.A. 58, 59, 60). When shown an alligator clip from the Flipside store and an alligator clip obtained in a Hoffman Estates Ace Hardware Store, Mr. Williams conceded that there was no design differential between the two, but maintained that the Flipside alligator clip would be covered by the Ordinance while the Ace Hardware alligator clip would not. (J.A. 66, 67). The Ace Hardware clip would not be regulated because it "looks like it is designed and marketed for use for electrical connections." (J.A. 67). When asked if the Flipside alligator clip would be covered if it was displayed without any signs in an area where literature was displayed, Mr. Williams stated:

> It would be if an officer could tell me that it can be used or is presumed to be used for illegal cannabis and drugs.

(J.A. 67).

Mr. Williams further testified that the mere proximity of certain literature to other items would cause a store to fall within the ambit of the Ordinance, and therefore be "taxed" and its customers subjected to the requirement of the police register. (J.A. 62). Also, the presence of a provocative word, design, decal or emblem on an item may be sufficient to identify that item as designed for use with illegal drugs. (J.A. 62). With regard to a jewelry item called "Roach Clip earrings" which bear on their package the slogan "Express Yourself", Mr. Williams stated that he did not believe they could be regulated "unless an expert trained and experienced in the field could say that he has found those to be used with illegal cannabis or drugs." (J.A. 64).

Mr. Williams also testified that unless a merchant acknowledged that every item in his store is designed or

marketed for use with illegal cannabis or drugs, the merchant would conceivably be required to litigate at administrative hearings the design of every item in his inventory, as well as his intended manner of display, in order to know if the sale of a particular item rendered him liable to punishment. (J.A. 64, 65).

When asked how a person would know whether items he sold were covered by the Ordinance, Mr. Williams testified that it would depend on the marketing aspect of the item. (J.A. 72). When asked what is the key to the marketing aspect and how it is reflected in the Ordinance, Mr. Williams responded that "[t]he key is when you have all of those items such as that are on your table, [Exhibits] one through 80, many of which when displayed with tobacco, [or] displayed elsewhere in the store, may well not be designed and marketed for illegal use, but when displayed together create one marketing concept of illegal use with illegal drugs." (J.A. 72). According to the drafter of the Ordinance and License Guidelines, proximity to other items alone is sufficient to change the essence of an item so as to render it subject to the burdens of the Ordinance. (J.A. -73). Mr. Williams explained by stating that he "think[s] the nature of marketing changes the presumptive use when they are placed with other items such as roach clips and those mentioned that would be illegal." (J.A. 73). When the questioning turned toward how many items were necessary to trigger the Ordinance, Mr. Williams admitted advising Mr. Rosenbaum to use the police registry for every item in the store. (J.A. 71).

Village President Virginia Hayter testified that she did not know what "paraphernalia designed or intended for

use with illegal drugs" is, because she is not an expert. (J.A. 75). In Ms. Hayter's opinion a hemostat and a glove stretcher, if displayed together, would not be covered under the ordinance because they have lawful purposes. (J.A. 77, 78). Ms. Hayter presumed that white cigarette papers would be within the purview of the ordinance if they bore the slogan "after all, it is only a weed that turns to a flower in your mind," although she acknowledged that the slogan "to some would mean one thing and to some other people it would mean some other things." (J.A. 78, 79).

As counsel for Flipside Records attempted to ascertain from the Village President what type of literature encourages the use of drugs, the trial judge questioned the necessity of hearing further evidence stating "I don't need any witness to tell me what papers are, what roach clips are and what pipes are. I know the meaning of paraphernalia." (J.A. 80, 81). He suggested that the proceedings could be shortened by stipulation. (J.A. 81, 82). Subject to the filing of written memorandum identifying the retail source of the 80 exhibits, the parties stipulated to their admission into evidence. (J.A. 81, 82).

Ms. Hayter then testified about pipes. She concluded that if they were the kind she had never seen used for ordinary tobacco, or if the aperture did not appear to be the kind that her husband's pipes have, then they are drug paraphernalia. (J.A. 85). However, since she is not an expert, Ms. Hayter testified that she relies "on those people who know what drug paraphernalia is, per se." (J.A. 84).

At the close of the hearing, the trial court requested the parties to submit proposed findings of fact and conclusions of law. (J.A. 86).

On May 14, 1979 and July 9, 1979, the parties filed with the Clerk of the District Court the following stipulations and stipulated testimony:

1) Ordinance 932-1977 was made part of the trial record. (J.A. 19).

2) That John O'Connell, Chief of Police of Hoffman Estates, would testify that any pipe could be used to smoke marijuana; that the presence of a phrase or picture suggesting possible association of an otherwise lawful item with a controlled substance (e.g., a marijuana leaf) would subject the item to coverage; that selling pipes or other smoking material in proximity to literature concerning drugs could activate the license requirement; that if an existing pipe store began to sell certain literature such as High Times and Stone Age then the sale of all pipes would fall under the regulations and prohibitions of the ordinance; mirrors are not covered by the ordinance; scales would be covered if they exhibit suggestive phrases or pictures; that the purpose of the police register is to discourage persons in the Hoffman Estates community from purchasing those items; and that Chief O'Connell is unable to make specific determinations as to what items are covered and that those determinations would be left to the judgment of detectives on his staff. (J.A. 33, 34).

3) That Donald Levin, President of Adams Apple Distributors, Inc., would testify that Plaintiff's Exhibit 1-15, 28-60, and 66-79 were identical or similar to items furnished by Adams Apple Distributors, Inc. to Flipside Records. (J.A. 27, 28).

4) That Larry Rosenbaum, agent for Flipside Records, would testify that Plaintiff's Exhibits 1-25, 28-60, and 66-79 were items displayed and sold at Flipside Records

prior to May 1, 1978, the effective date of the ordinance. (J.A. 29, 30).

5) That Helen Wozniak, Clerk of the Village of Hoffman Estates, would testify that the subject ordinance is regulatory; that the $150.00 fee was established to compensate the Village for the costs of administering the ordinance; that the Village's general business licenses cost $30.00; that the additional cost created by the subject ordinance is assessed to compensate additional expenses. (J.A. 35, 36).

6) That a pipe expert would testify that pipe smoking has been a human habit for over 1,000 years, that pipes can be fashioned from almost any type of material, that pipe bowls and stems are of various shapes and sizes, that design is a matter of the personal preference of the user, and that there is a nationwide market for all pipes as collectibles. (J.A. 25, 26).

7) That Dana Mallek, deputy Clerk of the Circuit Court of Cook County, Illinois, would testify that the number of cannabis and controlled substances prosecutions in the Village of Hoffman Estates in the months of July, August, September and October in 1978, when the ordinance was in effect, was more than twice as great as the same months of the previous years, when the ordinance was not in effect. (J.A. 37).

On February 15, 1980, Judge Leighton entered a Memorandum order awarding judgment to the Village. (J.A. 88). After denial of Flipside's Petitions for Rehearing and Reconsideration a timely notice of appeal was filed. (J.A. 89, 96, 110).

The United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court, and the Village filed a notice of appeal and filed its Jurisdictional Statement in this Honorable Court on April 3, 1981.

ARGUMENT

I. The Court of Appeals Correctly Found The Hoffman Estates Ordinance And Accompanying Guidelines Unconstitutional For Vagueness Because They Fail To Provide Sufficient Notice To Merchants Or Sufficient Guidelines For Enforcement And Adjudication.

A. The Hoffman Estates Ordinance Exhibits Extreme Potential For Abuse, Infringes Upon First Amendment Rights, And, Therefore, Should Be Subjected To A Stringent Standard Of Review.

The Appellant's initial argument is an attempt to characterize the Ordinance in such a manner as to apply a liberal standard of review. Thus, virtually conceding that the Ordinance could not pass any more rigorous standard, the Appellants' claim that we are concerned with a simple "licensing ordinance," that is "civil in nature," that is "not 'grave,'" but only a mere "economic regulation." (Appellants' Brief - 10, 11, 12). The Appellant respectfully suggests that the due process clause of the Fourteenth Amendment, and the historic concern for the protection of free expression outweigh any comity-based policy of legislative deference in the case at bar.

The Seventh Circuit recognized that the standard of review was not at issue because under any standard of review the Hoffman Estates scheme could not pass the threshold question of vagueness. The Court stated:

> This ordinance is subject to attack for vagueness despite the fact that it is an ordinance, not a statute, and it purports to license, not prohibit, sale of "items designed or marketed for use with illegal cannabis or drugs." A law may run afoul of the vagueness doctrine even though it does not impose

> criminal sanctions, because the fundamental defect is not the penalty but rather "the exaction of obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). The lack of a criminal penalty in the ordinance does not excuse vagueness where the effect is to deprive persons of constitutional rights. *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966) ("this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"). *See* also *Bence* v. *Brier*, 501 F.2d 1185, 1188 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); *Soglin* v. *Kauffman*, 418 F.2d 163, 166-67 (7th Cir. 1969). Furthermore, in determining whether a civil or criminal enactment is sufficiently clear that persons affected can determine what the law requires of them, the same rules of construction apply whether it is a statute or an ordinance. *Martin* v. *King*, 417 F.2d 458, 461 (10th Cir. 1969). (Footnote Amitted).

Flipside Etc. v. *Village of Hoffman Estates*, 639 F.2d 373, (7th Cir. 1981). The Appellee concurs, but further submits that in the event a particular standard of review must be chosen it should be a stringent one.

This Court has recognized that the problem of determining whether an enactment is penal or regulatory in character has been extremely difficult and elusive of solution. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168 (1963). In *Kennedy*, this Court set forth some of the factors to be considered in making such a determination. Although not conclusive, they are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment —retribution and deterrence, whether the behavior to which it applies is already a crime, whether an

> alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. (Footnotes omitted).

Kennedy v. *Mendoza-Martinez, supra* at 168. This Court has also recognized the attachment of social stigma or damage to reputation as a result of enforcement to also be a factor. *Morisette* v. *United States,* 342 U.S. 246, 256 (1952). The Appellee respectfully submits that an examination of the practical realities envisioned by the Hoffman Estates scheme create at least a quasi-criminal enactment.

First, the Ordinance creates an affirmative restraint in that the merchant is prohibited from employing anyone who has *ever* been convicted of a drug related offense.[11] Second, the requirement of abandoning one's expectation of privacy in his papers has always been a criminal sanction similar to that imposed upon a parolee. The scienter aspect will be discussed in another section of this Brief. Third, the record unequivocally establishes that the Ordinance was intended to discourage the Appellee's business. There can be no doubt that alternatives exist or that the burdens imposed are excessive. Finally, to comply with

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[11] The Appellee notes that the ordinance is also unconstitutional because it denies due process to a potential employee of a retailer deemed covered by the Ordinance if he has ever been convicted of a drug offense. The irrebuttable presumption of unfitness the ordinance creates reaches too broadly since it encompasses persons who may have evidenced their rehabilitation by leading conviction-free lives for many years. The Appellee has never raised this argument solely because it may lack the standing to complain of such an injury. But see *Hilbers* v. *Municipality of Anchorage,* 611 P.2d 31 (Alaska Sup. Ct. 1980).

the Ordinance an applicant must publically admit that he is engaged in the business of aiding others to violate the law. The Appellee suggests that it is obvious that this Ordinance is not a mere licensing law. *See Housworth* v. *Glisson*, 485 F.Supp. 29 (N.D. Ga. 1978) aff'd. 614 F.2d 1295 (5th Cir. 1980).

It is further submitted that a stringent standard of review is appropriate because of the numerous First Amendment violations provided for by the Ordinance and Licensing Guidelines. It is plain from the face of the Ordinance and the License Guidelines that they intrude upon First Amendment rights in at least four ways. First, the Ordinance is unconstitutionally overbroad because it penalizes the sale of lawful items and brings within its sweep protected speech. *Zwickler* v. *Koota*, 389 U.S. 241, 250 (1976). Second, it places a prior restraint on those who would sell literature that might be subjectively deemed drug-oriented and at the same time sell items of ordinary use which otherwise would not be subject to the Hoffman Estates scheme. Although the Ordinance does not go so far as to prohibit the sale of drug-related literature, its inhibiting effect is sufficient to place it in the category of a prior restraint. *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58 (1963). Any system of prior restraint comes into court bearing a heavy presumption against its constitutional validity. *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975); *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971). Third, the Hoffman Estates scheme infringes protected symbolic speech. The stipulated testimony of Police Chief O'Connell plainly establishes that an otherwise unsuspect item would be presumed *derivative* contraband if it bore anything deemed to suggest drug use. (J.A. 33, 34). Hence, the presence of designs, logos or slogans will trigger en-

forcement. A symbol may be as powerful a statement of an idea as a word and is entitled to as much protection. *Spence* v. *Washington*, 413 U.S. 405 (1974); *Tinker* v. *Des Moines*, 393 U.S. 503 (1969). And fourth, the notion that a display of lawful items may be deemed "marketed for use with illegal . . . drugs" on the basis of some undefined spatial "proximity" to other equally lawful items or literature is sufficient to trigger the onerous and burdensome requirements of the Ordinance is inconsistent with the right to commercial free speech. It is now unquestionably the law that commercial speech is entitled to protection under the First Amendment. *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Board of Pharmacy* v. *Virginia Consumer Council*, 425 U.S. 748 (1976).[12] The Appellee submits that display has been the most primordial and enduring message known to commercial communication. If a hopeful seller cannot arrange and present his wares in a competitive manner for fear of offending a policeman's sensibilities, then a vested government is free to suppress any disfavored merchant. Where protected expression becomes the criterion for the imposition of humiliating licensing burdens, the necessary result is an infringement of First Amendment rights. When legislation affects First Amendment rights it must be subjected to strict scrutiny. *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

The Appellee requests this Court to bear in mind a final potential for constitutional abuse inherent in the

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[12] The Appellee realizes that protected expression is not entirely immune from regulation. These issues were fully briefed but not addressed by the Court below, but are still relevant to this Appeal in relation to a determination of the appropriate standard of review.

Hoffman Estates scheme in its analysis of the appropriate standard of review. The requirement of the police register, in conjunction with the total lack of safeguards in either the Ordinance or the License Guidelines, raises disquieting Fourth Amendment ramifications. This issue was first specifically addressed by the Eighth Circuit in *Geiger* v. *City of Eagan*, 618 F.2d 26 (8th Cir. 1980). The Eighth Circuit noted:

> The ordinance further lacks arrest and search standards for enforcement officials. Under the ordinance, the possession of a "drug-related device" could be the basis for an arrest even if there was no controlled substance present. Also, seeing "any pipe or other object suitable to be used for smoking" could be the basis for a search to determine if characteristics which turned it into a "drug-related device" were present. An arrest for possession of a "drug-related device" could support a search for controlled substances in a vehicle or a home or on a person. Where definite guidelines for enforcement officials are not present, use of the ordinance to expand arrest opportunities and justify searches magnifies the potential harm from enforcement of the ordinance.

Id. at 29. Although the ordinance in *Geiger* imposed a direct criminal penalty, the precise potential for abuse exists in the instant Ordinance. If the "presumption" argued by the Appellant *truly* meets the standards enunciated in *Leary* v. *United States*, 395 U.S. 6 (1969), then one's signing of the police register for the purchase of a pipe could conceivably establish probable cause for the search of his home for narcotics. The Seventh Circuit expressed similar concerns about the dangers inherent in the Hoffman Estates scheme. *The Flipside, Etc.* v. *Village of Hoffman Estates, supra* at 385 n. 29.

Therefore, the Appellee contests the Appellants' characterization of their enactment as a mere "regulation,"

and respectfully submits that the standard of review urged by the Appellants is inappropriate.

B. The Ordinance and Guidelines Fail to Adequately Apprise Merchants Which Items Or Manner Of Display Will Initiate Enforcement?

Village of Hoffman Estates Ordinance 969-1978 purports to license and restrict the sale of alleged drug-related paraphernalia under the rubric "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs." The License Guidelines, adopted almost contemporaneously with the Ordinance and found to be "an integral part" of the Ordinance by the District Court, 485 F. Supp. 400, 404 (N.D. Ill. 1980), purport to define certain terms relevant to the Ordinance. (J.A. 69). Neither document provides ascertainable standards for merchants who must conform their conduct to the dictates of the law, or clear and workable guidelines for enforcement and adjudication. *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). Every phrase of the Ordinance is subjective and open-ended, and the language is woefully lacking in "objective content from which ascertainable standards defining the proscribed conduct could be fashioned." *Bence* v. *Breier*, 501 F.2d 1185, 1190 (7th Cir. 1974), *cert. denied* 419 U.S. 1121 (1975). The Court of Appeals accurately evaluated the language of the Ordinance, as "defined" by the Guidelines, and as interpreted by the Village attorney, the Village President, and the chief of police, and properly concluded that "designed for use" and "marketed for use" were impermissibly vague.

The revelant data supporting the decision of the Court of Appeals, as adduced at the hearings before the Dis-

trict Court through the testimony of the Village attorney, the stipulation of the chief of police, and the language of the Ordinance and Guidelines themselves, suggest two conceptually distinct standards. These standards may be stated as follows:

1. "DESIGNED . . . FOR USE" STANDARD.

An item of merchandise is deemed "designed for use," and therefore subject to the requirements of the Ordinance if, in the opinion of a "trained and experienced officer" on the beat, its particular structural "design" (*viz.* physical attributes) are interpreted to be inherently suited for use with controlled substances, and readily distinguishable from designs which are not. (J.A. 33, 58, 64, 65, 66, 67, 68, 69; Tr. 86; License Guidelines). The Guidelines further provide that cigarette rolling papers that are of "colorful design" (as opposed to white cigarette rolling papers), cigarette papers with trade names "oriented for use with illegal cannabis or drugs," and "roach clips" are items "designed for use" and *per se* within the purview of the Ordinance.

2. "MARKETED FOR USE" STANDARD.

An item is "marketed for use" if its "manner of display" involves its display in "proximity" to items deemed *per se* "designed . . . for use," such as "roach clips," "non-white" cigarette rolling papers, or "literature encouraging illegal use of cannabis or illegal drugs." The display in "proximity" of otherwise neutral and innocent items to *per se* items subjects the entire combination to regulation under the Ordinance. In addition, the display together of a variety of innocent items may be considered to be a suspect "manner of display." (J.A. 33, 34, 59, 60, 61, 62, 72, 73, 74; License Guidelines).

The Appellee submits that while neither standard offers a clear means of distinguishing between items of merchandise covered or not covered by the requirements of the Ordinance, the existence of two standards, which may be applied alternatively, compounds the vagueness of the Ordinance and its Guidelines. The "designed for use" and "marketed for use" standards provide no objective criteria limiting the scope of their coverage. The breadth of the "designed for use" restriction is potentially limitless including anything and everything that could conceivably be used with controlled substances. *See Geiger* v. *City of Eagan,* 618 F.2d 26, 29 (8th Cir. 1980) (Objects "suitable" to be used for smoking controlled substances may depend upon the ingenuity and current practices of drug users); *Music Shop Inc.* v. *City of Ferndale,* 488 F.2d 390, 393 (E.D. Mich. 1980) (Determination of "primary use" requires a consumer survey of the "usually hidden activities and current vogues in use of the unlawful drug abusers as compared to lawful pipesmokers"); *accord Magnani* v. *City of Ames,* 493 F.Supp. 1003 (S.D. Iowa 1980); see also *Cole* v. *State of Oklahoma,* 511 P.2d 593, 595 (Okl. Cr. 1973) ("practically any article that the average person might have in his possession could be used by abusers of controlled substances," and therefore considered to be "paraphernalia."). In construing, the "designed for use" phrase as defined by the Guidelines, the Court of Appeals properly relied upon the trenchant reasoning of the three judge district court in *Indiana Chapter, N.O.R.M.L.* v. *Sendak,* No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) (Swygert, Cir. J. presiding)[13] The *N.O.R.M.L.* court stated:

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[13] Vacated and remanded as moot on appeal because the Indiana legislature had repealed the statute held to be unconstitutional. 631 F.2d 734 (7th Cir. 1980). *See* (Appendix of Unreported Decisions—37a).

> It is unclear what is meant by an instrument "designed" for drug use. The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the ordinance] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.

Id., slip. op. at 12-13; (Appendix of Unreported Decisions—48a). The Court below properly recognized the ambiguity inherent in the phrase "designed for use":

> The license guidelines imply that terms "designed" for use with drugs means those items which are inherently suited only for drug use, and are thus covered by the ordinance regardless of the manner of display or avowed intent of the retailer. For example, the guidelines state that "roach clips" are "designed for use with illegal cannabis or drugs and therefore covered," (emphasis added). But the guidelines do not define "roach clip." Consequently, stocking any item that could possibly be used as a roach clip, such as an alligator clip or bobby pin, could subject a retailer to the licensing requirement. In reality, it is inconceivable that sale of these innocent items would subject a hardware store or drugstore to the burdens of the license fee and sales register, as well as to the label of "drug paraphernalia store." Perhaps the village wishes to draw a line between items which inherently are roach clips

and "innocent" items merely used as roach clips. But neither the ordinance nor the guidelines draws this distinction, and we are uncertain as to whether any definition of a roach clip could draw such a distinction based on design alone.

Another item which the guidelines say is inherently drug related is "paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed." But the guidelines also say that "white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed." This guideline attempts to tell the retailer which rolling papers are covered and which are not, but the definition is circular because it puts the burden back on the retailer to decide what is "tobacco oriented" paper not necessarily designed for use with drugs and what is "drug oriented" paper. Is all white rolling paper outside the ordinance, even if there is an advertisement for a water pipe on the package? Does "paper of colorful design" mean that brown or beige paper is covered, or could some colored paper be considered "tobacco oriented"?

An additional element of vagueness in the "designed for use with drugs" standard is added by the fact that the manufacturer, not the retailer, designs the items sold. Consequently, the design intent of the manufacturer, not of the regulated seller, triggers the retailer's duty to obtain a license and the customer's obligation to sign a register available to the police.

639 F.2d at 380-81 (footnotes omitted). The simple assertion that items "designed" for drug use are subject to the requirements of the Ordinance fails to convey the precision necessary to satisfy due process. *Smith et al.* v. *Roark*, (No. 80-2120, May 13, 1980, S.D.W.Va.) (Appendix of Unreported Decisions—77a). As noted by the Court of Appeals for the Sixth Circuit in *Record Revolution No. 6* v. *City of Parma*, 638 F.2d 916 (6th Cir. 1980):

> The major ambiguity in defining drug paraphernalia in terms of the "design" of items is the lack of any design characteristics that distinguish lawful purposes from unlawful purposes. The type of object that can become, or be used as, drug paraphernalia is limited only by the imagination of the user. *Geiger* v. *City of Eagan*, 618 F.2d at 29. The record in our cases established the absence of any unique design characteristics. Plaintiffs' expert, Herbert J. Bessai, testified that the size of a pipe, the presence of a screen or chamber in a pipe, the material from which the pipe is made, or the use of ice, water or air in a pipe does not indicate a design for unlawful use. He discussed in some detail the lawful uses of all of these design characteristics. According to Bessai, the various designed pipes have been used lawfully for centuries. *Rose* v. *Locke*, 423 U.S. at 50, 96 S.Ct. at 244. Bessai's testimony, as the sole expert at trial on the making and smoking of pipes, stands unrefuted. When asked directly if Bessai's testimony was incorrect, Detective Rutt of the Cleveland Police Department's Narcotics Unit testified that he could not say Bessai was wrong. Consequently, we conclude that defining drug paraphernalia in terms of "design" is vague and overbroad.

Id., at 930-31 (footnotes omitted).[14] The substance of Herbert Bessai's testimony is included in the stipulated testimony of the pipe expert in this case. (J.A. 25). The significance of the testimony of these pipe experts cannot be overlooked. Because physical characteristics which unqualifiedly distinguish drug-related merchandise from

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[14] On appeal, this Court dismissed the municipalities' appeal, No. 80-1507, vacated the judgment, and remanded to the Sixth Circuit for consideration in light of Section 2925.14 of the Ohio Revised Code, a statute which makes it a criminal offense for a person to sell or offer to sell "drug paraphernalia" to a juvenile. 49 U.S.L.W. 916 (May 26, 1981).

non-drug-related merchandise cannot possibly be isolated and specifically listed[15], the Village legislature has drafted a sweeping and overinclusive prohibition, and has intentionally delegated to the policeman on the beat the power to determine what species of merchant conduct is subject to the difficult requirements of the Ordinance; and what conduct, while perhaps obnoxious to the police officer's aesthetics or political viewpoint, may be carried on without the merchant's obeying the license and police register requirements and without regard to the placement or content of literature sold by the merchant.

Even the attempts by the Village attorney to apply the Ordinance and Guidelines to specific items clearly show unavoidable confusion. In his testimony before

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[15] *See Record Revolution No. 6* v. *City of Parma*, 492 F. Supp. 1157, 1166 (N.D. Oh. 1980) wherein the District Court noted that "nearly every item that is used with illegal narcotics also has a customary and innocent use," and that "a blanket prohibition would be so imprecise as to lead to selective enforcement which would be unconstitutional;" *cf. Geiger* v. *City of Eagan*, 618 F.2d 26 (8th Cir. 1980), where the Court of Appeals held the rubic "drug-related device" unconstitutionally vague because the enumerated characteristics failed to distinguish tobacco smoking accessories from drug paraphernalia. The Eagan ordinance defined "drug-related device" as "any pipe or other object suitable to be used for smoking" with one of the following characteristics:

1. Contains a visible fine wire mesh screen; or
2. Contains a bowl with the interior surface made of metal, glass, acrylic, plexiglass or plastic; or
3. Contains a bowl with an inside diameter of one-half inch or less at the halfway point between the top and the bottom of the bowl; or
4. Contains a chamber; or
5. Contains a flexible tube or tubes.

the District Court, attorney Williams stated that if an "expert trained and experienced in the field" could say that he had found earrings to be used with illegal cannabis or drugs, they may be covered even though they are marketed as jewelry with the clearly stated purpose —"Express Yourself." (J.A. 63, 64). When discussing enforcement from the viewpoint of a hypothetical "trained and experienced officer," Mr. Williams testified that where any item has been observed in illegal use, similar items of merchandise will be *presumed* to be *per se* covered by the Ordinance (J.A. 65).

The Appellant believes and respectfully submits that this "designed for" standard is not a clear means of distinction. Since all the items sold at Flipside Records are lawful items capable of innocent uses, it is incumbent upon the Village trustees to delineate precisely the design features which are inherently drug-related.[16]

The "marketed for use" standard is equally ambiguous. The foundation of the second standard is the assumption that certain items, when considered in isolation, are deemed "designed for use" with drugs and *per se* within the purview of the Hoffman Estates scheme (the first standard); then that coverage extends to other innocuous, neutral items automatically from their display in mere spatial proximity to these *per se* items. (e.g., a traditional briar pipe displayed in "proximity" to cigarette rolling paper of "colorful design, names oriented for use with illegal cannabis or drugs.") The Court of Appeals noted that neither the Ordinance nor the Guidelines define "proximity." 639 F.2d at 382 n. 23; and that

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[16] The second paragraph of the preamble to the Ordinance provides, "WHEREAS, it is recognized that such items are *legal* retail items and that their sale cannot be banned."

the "manner of display" criterion could encompass any item displayed in "proximity" to "literature encouraging illegal use . . . of drugs."

The Court stated:

> This means that paper clips sold next to *Rolling Stone* magazine conceivably could trigger the requirements of the ordinance. Perhaps the village would not construe the ordinance in this manner. But the point is there is no way for a seller to determine what particular item or arrangement of merchandise will require a license.

Id., at 383. The Court of Appeals correctly recognized the dependency of the "marketed for" standard upon the "designed for use" standard:

> Since . . . the ordinance and guidelines are vague as to what constitutes items designed for use with illegal drugs, the ordinance is equally vague as to what supposedly designed-for-drug items will bring other items under the ordinance through the marketing proximity standard.

Id.

Inasmuch as the "designed for use" criterion is vague in failing to adequately define the items inherently suited for use with drugs, and because the "marketed for use" standard presumes the existence of items "designed for use" with drugs, both standards fail to satisfy due process.

The Appellants argue that the Ordinance applies only to retailers and urge that the case of *McGowan* v. *Maryland*, 366 U.S. 420 (1961) is controlling. (Appellant's Brief—12, 13). The Appellee contends that the Seventh Circuit considered and properly discarded this notion. *Flipside Etc.* v. *Village of Hoffman Estates*, *supra* at

383. The Appellants argue that since Flipside has been deemed engaged in retailing items "designed or marketed for use with illegal . . . drugs," they should be apprised as to the scope of the Ordinance "either through their own expertise or by making reasonable investigations." (Appellants' Brief-13). The Appellee suggests that imposing such a burden on merchants situated like the Appellee is unfair and conclusory. The Seventh Circuit noted that "to apply the *McGowan* analysis here would beg the question in issue." *Id.* at 383. First, it is plain that a merchant cannot simply enter into the realm of drug abusers and conduct a marketing survey to ascertain at any given time what particular items, if any, are specifically designed for drug use; and second, Flipside contests the notion that it is engaged in retailing items "designed or marketed for use with illegal cannabis or drugs." The *McGowan* decision noted an extrinsic and accessible reference source, *i.e.*, the beach or amusement park, by which the merchant subject to such an enactment could easily and reliably determine the items which could be sold on Sundays. In this case no such reference source exists. *See Music Shop* v. *City of Ferndale,* 488 F.Supp. 390 (E.D. Mich. 1980); *accord Magnani* v. *Ames,* 493 F.Supp. 1003 (S.D. Ia. 1980). The Seventh Circuit correctly found that to apply the *McGowan* standard to the Hoffman Estates scheme is to put the cart before the horse.

It is erroneous and unfair to suggest that the removal of merchandise from display and sale at Flipside prior to the enforcement of the Ordinance indicates that the Plaintiff clearly understood the requirements of the Ordinance and Guidelines. (Appellants' Brief-15). Since Flipside refused to acknowledge that it sold or displayed drug-related paraphernalia, the decision was made to re-

move a wide variety of smoking accessories, jewelry, and novelties from display and seek a determination as to the constitutionality of the Ordinance in federal district court. A violation and arrest would have initiated local proceedings, requiring a federal court to abstain from considering Flipside's claims for injunctive and declaratory relief until all state remedies had been exhausted. *Younger* v. *Harris*, 401 U.S. 37 (1971). Without comprehending the restrictions of the Ordinance, Flipside removed all merchandise, including literature, which it felt could conceivably be considered suspect by Village officials. (J.A. 47). Compliance with the licensing and police register requirements was not considered an alternative since The Flipside believed at that time, and continues to believe, that the Ordinance and Guidance are vague and incapable of a workable application. Village attorney Williams testified that when Larry Rosenbaum, one of Flipside's officers, contacted him and requested guidance as to which items would be covered by the Ordinance, Mr. Williams advised him to maintain a sales record of *all* items sold "for his protection." (J.A. 71). It should be self-evident why Flipside sought not to antagonize its customers with the police register procedure; and chose to be overbroad in its removal of merchandise and literature rather than risk a violation. The Court of Appeals properly recognized Flipside's true motivation in removing merchandise from its shelves. 639 F.2d at 380 n. 13.

C. The Hoffman Estates Scheme Countenances Arbitrary and Discriminatory Enforcement By Failing To Provide Explicit Standards To Those Entrusted To Enforce The Law.

The Appellants argue first that because of the License Guidelines and the existence of a Village Administrative Procedure Act; and, second, that since the Hoffman

Guidelines are somehow similar to the tenuous guidelines of the Model Act, they suffice to give notice to the "retailer." (Appellants' Brief-24, 25). However, surprisingly, nowhere in Appellants' Argument IB do they even claim that adequate guidelines are provided to police, judges, or juries. The record is uncontroverted and the Appellants concede that both the Village Attorney and the Village President "admitted they would have to rely on police opinion to inform them which objects were presumed to be [covered]." (Appellants' Brief-5). One portion of the stipulated testimony of Police Chief O'Connell reads as follows:

> The Chief would not be able to state which specific items were covered by the Ordinance and would testify that determination as to which items actually fall under the purview of the Ordinance, at any given time would be left, in large part, to the judgment of detectives on his staff.

(J.A. 35). The record establishes beyond peradventure that the police were given unfettered discretion. Since no objective criteria are included in the Hoffman Estates scheme for discriminating between innocent conduct and "regulated" conduct, the police officer is required to rely upon his subjective opinions, aesthetic preferences and political predilictions.

This failure to set definite and objective standards for enforcement is an impermissible abdication of the legislative function to "those engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10 (1948).

In *Gregory* v. *Chicago,* 394 U.S. 111 (1969), this Honorable Court stated:

> [U]nder our democratic system of government, lawmaking is not entrusted to the moment-to-moment

> judgments of the policeman on his beat. Laws, that is valid laws, are to be made by representatives chosen to make laws for the future, not by police officers whose duty it is to enforce laws already enacted and to make arrests for conduct already made criminal. One of our proudest boasts is that no man can be convicted of crime for conduct, innocent when engaged in, that is later made criminal . . . To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws.

Id. at 121. The Appellee respectfully submits that the Hoffman Estates scheme completely fails to fulfill the crucial second prong of the *Grayned* standard.

The Appellants' next argue that the vagueness of the Hoffman Estates scheme is cured by the existence of an Administrative Procedure Act "for . . . specific regulatory standards." (Appellants' Brief-24). The Appellee suggests that such a notion is illusory. In any such adjudication, the administrative tribunal must of necessity look to the Ordinance and License Guidelines to make any determination. To argue that the Ordinance will in turn be rendered clear is an obvious exercise in circularity. Since the Ordinance is inadequate, License Guidelines were added, and since the License Guidelines are likewise inadequate, the merchant is now afforded the privilege of petitioning the Village officials to make *ad hoc* decisions as to the meaning of their enactment. Enforcement of this scheme would require a licensee to come before an administrative tribunal in advance and submit for their approval such routine matters as adding a new item, changing his retail floor plan, rearranging the items in his display case, stocking various literature, and deciding where it may lawfully be displayed within the store. And the tribunal, armed only with the vague terms of their enactment and their personal opin-

ions, will rule on when a merchant must obtain a license and when his customers must expose themselves to police scrutiny. The Appellee respectfully suggests that the very existence of such a back up system is a monument to the vagueness of the Hoffman Estates scheme.

The Appellants argue that the "marketed for use" phrase finds its basis in the case of *Leary* v. *United States*, 395 U.S. 6 (1969). *Leary* established that for a statutory presumption to pass constitutional muster, empirical data must establish with "substantial assurance" that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Id.* at 36, 37. The Hoffman Estates scheme and the evidence adduced at trial indicate that a regulatable "marketing scheme" would be found whenever one or more items of a genus that police have found in the past to have been used with controlled substances were displayed; or, whenever literature deemed to encourage "illegal use of . . . drugs" were in "proximity." Applied to the Hoffman Estates scheme the question becomes: does the "fact proved" (some ill-defined and nebulous display labeled as the "marketing scheme") provide substantial assurance that the "presumed fact" (the use of so-marketed items with drugs), is more likely than not? *Id.* at 37. The Seventh Circuit answered in the negative, stressing that the primary fact was insusceptible to any proof. Since there is no marketing scheme defined with constitutional adequacy in the Hoffman Estates scheme, the operational "fact proven" can never be established. The fact to be proved is so vaguely intimated and open to subjective and perhaps prejudicial interpretation that neither those who might be deemed expected to comply, nor those entrusted to vigorously enforce the law would be apprised of when the alleged *Leary* presumption

would attach. *Flipside, Etc.* v. *Village of Hoffman Estates, supra* at 382. The Seventh Circuit, in noting the vacuity of the concept of "marketing scheme", correctly distinguished the "rational connection" issue in *Leary* from the vagueness issue presented by the Ordinance. *Id.* Hence, the concept of a *Leary* presumption in no manner tends to satisfy the enforcement prong of the *Grayned* test.

The Appellee respectfully submits that the Seventh Circuit properly found that the Hoffman Estates scheme fails to provide guidelines sufficient to prevent arbitrary and discriminatory enforcement.

II. The Hoffman Estates Scheme Is A Strict Liability System, And, Therefore, The Merchant's State Of Mind Is Irrelevant.

The Appellants apparently view this appeal as an opportunity to suggest a construction of the Ordinance and Guidelines which they never urged before the Court of Appeals or the District Court. The Appellants admonish the Court of Appeals for failing to construe "designed for use" as referring to an intentional act, instead of the particular structural characteristics of an item which has been "designed" for drug use. (Appellants' Brief—16). The Appellees note that this construction is obviously at odds with the plain language of the Ordinance and Guidelines, the interpretation given the "designed for use" phrase by the Village attorney and chief of police, and the construction given the language by other courts. Despite the Appellants' arguments to the contrary, the Hoffman Estates scheme creates a strict liability system. *See* Ill. Rev. *Stat.* Ch. 38, §4-9. It is readily apparent that under the Hoffman Estates scheme, the "designed for use" phrase refers to the physical characteristics of items deemed *per se* fashioned for

use with drugs; and that, if any intentional conduct is implicated by the phrase, it is the intent of the "designer" (i.e., patent holder or manufacturer) whose intent for an item or "design" is absorbed into the physical attributes, or structural "design" of the finished product.[17] Since under the Ordinance and Guidelines the responsibilities of obtaining a license and keeping the police register fall upon the merchant, who merely displays and sells the item, and not upon the manufacturer, who "designs" the item, the plain reading of the Ordinance compels the conclusion that "designed for" refers to the structural "design" of the item displayed, and not to the "design" of the merchant who displays the item.

Prior to this appeal, the Village defendants have openly interpreted the "designed for use" phrase as referring to the drug-related physical characteristics of the item *per se*.[18] Moreover, the Guidelines define what items may

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[17] *Cf. Mid-Atlantic Accessories Trade Ass'n.* v. *State of Md.*, 500 F.Supp. 834, 844 (D.Md. 1980); *accord New England Accessories Trade Ass'n.* v. *Browne*, 502 F.Supp. 1245, 1251 (D.Conn. 1980) (". . . a manufacturer is more likely to 'design' an item for use"). These decisions are concerned with the Model Drug Paraphernalia Act, a criminal law substantially different from the Hoffman Estates Ordinance and Guidelines. In the decision below, the Seventh Circuit specifically commented that the constitutionality of the Model Act was not at issue. 639 F.2d at 386 n. 31.

[18] In their Petition for Rehearing to the Court of Appeals, the Village Defendants argued:

> The Court has ignored the plain meaning of "designed" which requires a construction of *excluvisity*. The Court says at page 15:
> "The term 'designed' could signify only devices that have no use or function other than as a means to
> have no use or function other than as a means to ingest a controlled substance. Alternatively, 'de-

constitute items "designed for use" with drugs (*i.e.*, "paper of colorful design, names oriented for use with illegal cannabis or drugs;" "roach clips"). The position that an intent requirement may be read into the "designed for use" phrase is further undermined by the testimony of the village attorney and the stipulation of the chief of police. During his testimony before the District Court, village attorney Williams consistently focused on the physical characteristics of exhibited items to determine if they were "designed" for drug use. (J.A. 62-68). The stipulation of Chief of Police O'Connell clearly demonstrates how certain design attributes (e.g., a phrase or picture, such as a marijuana leaf appearing on an item) would subject the item to coverage under the Ordinance and Guidelines. (J.A. 33). The Court of Appeals correctly recognized that neither the Ordinance nor the Guidelines draws a clear distinction between items which are inherently drug-related and innocent items which are merely capable of illicit use. 639 F.2d at 380 and nn. 17, 19.

The decisions which have been relied upon by the Appellants in urging a different construction of the "de-

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[18] (Continued)

> signed' could include any devices that have a legitimate function but could be used for ingestion of drug."
> The alternative definition in an exercise to ignore [sic] the ordinary meaning. "Designed" falls under the first definition, a definition with which the Defendant agrees. The second definition providing alternative uses contradicts itself since if the devices have more than one use then it is not designed for "use with illegal drugs"—it is designed for use with illegal drugs and other purposes and falls outside the Ordinance . .
> (Petition for Rehearing 3) (emphasis added).

signed for use" phrase are addressed to the Model Drug Paraphernalia Act, a criminal law substantially different from the Hoffman Estates Ordinance and Guidelines. Unlike the Hoffman Estate scheme, which imposes absolute liability upon merchants deemed covered, the Model Act has been construed to include a scienter requirement in the definition and offense sections.[19] However, numerous courts which have considered the Model Act have concurred with the reasoning of the Court below that "designed for use" vaguely refers to the physical attributes of the item deemed *per se* subject to prohibition under the law. *Record Revolution No. 6* v. *City of Parma, supra* 638 F.2d at 930-32; *accord Florida Businessmen, Etc.* v. *City of Hollywood,* 648 F.2d 956, 957 (5th Cir. 1981) (granting injunction pending appeal); *Eucalyptus Records, Etc.* v. *James,* No. C-81-402-RJM (E.D. Wash.,

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[19] The Model Act is of questionable constitutionality. Three courts of Appeals have considered the law and are in conflict as to its constitutionality. *Cf. Record Revolution No. 6, Inc.* v. *Parma,* 638 F.2d 916 (6th Cir. 1980) *with The Casbah, Inc.* v. *Thone,* ..... F.2d ..... (No. 80-2033, 8th Cir. decided June 8, 1981). The Fifth Circuit is in apparent harmony with the Sixth Circuit. *Florida Businessmen for Free Enterprise* v. *City of Hollywood,* 648 F.2d 956, 958 n. 1 (5th Cir. 1981) (order granting injunction pending appeal).

The Model Act is the creation of a single staff attorney at the Drug Enforcement Administration. Unlike most Model laws, the MDPA is clearly not the product of extensive study and analysis by educators, law enforcement leaders, or experts in the field. It is likely that the MDPA was based in large part on the statutes held unconstitutional by the three judge district court in *Indiana Chapter, NORML* v. *Sendak,* No. TH 75-142-C (S.D. Ind. 1980), but disseminated prior to the filing of that decision. (Appendix of Unreported Decisions —37a).

The Appellee urges this Court to consider the Hoffman Estates Ordinance and Guidelines as *sui generis* and distinct from the Model Drug Paraphernalia Act.

July 21, 1971) (Appendix of Unreported Decisions—1a), (granting preliminary injunction); *Information Management, Etc.* v. *Borough of Pleasant Hills*, 512 F.Supp. 1066, 1073 (W.D. Pa. 1981); *Weiler* v. *Carpenter*, 507 F.Supp. 837, 843-44 (D.N.M. 1981); *Lazy J. Ltd.* v. *Borough of State College*, No. 80-1167 (M.D. Pa., January 30, 1981), *slip* op. at 6 n. 4 (Appendix of Unreported Decisions—65a, 69a, 70a); *Backdoor Records* v. *City of Jacksonville*, 515 F.Supp. 857, 859 (E.D. Ark. 1981); *Gaffey* v. *Babb*, 50 Or. App. 617, 624 P.2d 616, 624-25 (Or.Ct.App.) petition for review denied No. 27709 (Or. June 16, 1981); *See also Record Head* v. *Sachen*, 498 F.Supp. 88 (E.D. Wisc. 1980) (reaching independently the same conclusion as the *Parma* court), and *cf. Hejira Corp.* v. *MacFarlane*, ... F.2d ..... (No. 80-2062, 10th Cir., decided May 5, 1981) ("designed" means "predetermined for a particular use").[20] This interpretation is clearly correct in light of the Model Drug Paraphernalia Act Comments which state:

> Objects whose sole, or at least dominant purpose is to produce, package, store, test or use illicit drugs are considered to be "designed" for such use. A rebuttable presumption exists that these objects are intended for use for the purpose for which they are designed. *See Israel* v. *United States*, 63 F.2d 345 (3rd Cir. 1933). As such, they are presumed to be

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[20] The Colorado statute at issue in *Hejira Corp.* v. *McFarlane* describes "drug paraphernalia" as "any machine, instrument, tool, equipment or device which is primarily adopted, designed and intended for "a drug-related use. The Tenth Circuit upheld the statute after severing the word "adopted" basing its strained rationale on the conjunctive "and" *slip op.* at 11-12. Since the Tenth Circuit decision was handed down, a Colorado state court has pointedly disapproved the reasoning of the Tenth Circuit and enjoined enforcement of the law. *Wakabayashi* v. *Tooley*, No. 81 CV 6293 (Dist. Ct., City and Co. of Denver, Co., decided August 18, 1981). (Appendix of Unreported Decisions—13a; 103a.)

drug paraphernalia. Isomerization devices designed for use in increasing the THC content of marijuana provide a good example.

In *Israel*, the Third Circuit court noted that the "peculiar construction" of copper boilers made them "designed" for bootlegging. *Cf. State of Three ISO-2 Devices*, 296 N.W.2d 510 (S.D. 1980) (Isomerization devices found not inherently criminal). "Designed for use" has been included in numerous statutes to refer to structural design attributes. *See e.g.*, 15 U.S.C. §1171 (a)(2) (gambling device): *United States* v. *Three Trade Boosters*, 135 F. Supp. 24, 27 (M.D. Pa. 1955); *United States* v. *Two "Exhibit Rotary" Coin Op., Etc.*, 107 F.Supp. 314, 316 (W.D. Okl. 1952); 18 U.S.C. §1792 (dangerous instrumentalities): *United States* v. *Swindler*, 476 F.2d 167, 169 (10th Cir.) *cert. denied* 414 U.S. 837 (1973); *United States* v. *Roche*, 443 F.2d 98, 100 (10th Cir. 1971); 18 U.S.C. §2512 (eavesdropping device): *United States* v. *Schweihs*, 569 F.2d 965, 968 (5th Cir. 1978). Moreover, the phrase "designed for use" has been construed so as *not* to require proof of specific intent to disobey the law. *United States* v. *Freed*, 401 U.S. 601, 610 (1971); *United States* v. *Swindler, supra* at 170.

The construction now urged by the Village defendants, that "designed for use" implies a specific intent requirement that might rescue the Hoffman Estates scheme from vagueness is clearly contradictory. Similarly, the suggestion that a particular "manner of display" or combination of items could reasonably give rise to a presumption of intent under the *Leary* doctrine is indefensible since, as the Court of Appeals correctly noted, the "manner of marketing" subject to restrictions under the Ordinance and Guidelines is far too vaguely described to provide guidance for either merchants or enforcement officials. 639 F.2d at 382, n. 21.

III. Assuming In Arguendo The Ordinance Requires An Intent Element, When The Subject-Matter Of An Ordinance Is Not Susceptible To Reasonable Clarity, An Intent Requirement Cannot Cure The Underlying Vagueness.

The Appellee has contended that the Hoffman Estates scheme envisions and establishes a strict liability system. Ill. Rev. Stat. Chap. 38 §4-9. Yet, the Appellant has seen fit to inject for the first time the alleged safeguard of an intent or scienter aspect as an element of the Ordinance. Although Flipside submits that no such element is required by the Hoffman Estates scheme, issues raised by the Briefs of Amici filed in this cause constrain the Appellee to address this variety of contention. At the outset, it should be understood that in regard to the instant cause, actually before this Honorable Court, the following writing should strictly be considered *in arguendo.*

The proposition is advanced that where specific intent is contained in a statute the requirement of scienter or a criminal state of mind alleviates the necessity of providing fair notice under the first prong of the *Grayned* test. (Amicus Brief of Arkansas, *et al.* 10, 11; Appellants' Brief-23). The cases of *Screws* v. *United States,* 325 U.S. 91 (1945) and *Boyce Motor Lines* v. *United States,* 342 U.S. 339 (1952) are relied upon to support this assertion. The Appellee respectfully submits that recent decisions of this Court and *Screws* and *Boyce* themselves belie this argument.

The Appellee contends that conditioning the application of an enactment upon a showing of scienter will ameliorate vagueness deficiencies only in an "as applied" challenge, and, further that the scienter element cannot constitutionally be utilized to define the offense. *Screws* v. *United States, supra* at 101. *The Town Tobacconistic* v. *Degnan,* No. C-2198 80 (Super Ct. Ch. N.J.

March 12, 1981), *slip op.* at 10 (Appendix of Unreported Decisions—93a, 100a, 101a); *Lazy J. Ltd.* v. *Borough of State College,* No. 80-1167 (M.D. Pa. Jan. 30, 1980), *slip op.* at 7-8. (Appendix of Unreported Decisions 65a, 70a, 71a). This Court has recently indicated that the issue of the effect of a scienter element will only be reached after the enactment has been adjudged constitutionally clear. *Caulotti* v. *Franklin,* 439 U.S. 379, 396 (1979). In *Caulotti* this Court found a Pennsylvania provision requiring a physician, when conducting an abortion, to preserve the life of a fetus that he determines to be "viable." Since this Court found the threshold question, the sufficiency of "viability" as used in the statute, void on its face, the scienter issue did not have to be addressed. Id. at 396. The implication is that only when the subject matter of an offense is objectively discernible will a scienter provision be referred to in a determination of whether an enactment is unconstitutionally vague.

An examination of *Screws* and *Boyce* establishes that this Court did not intend to allow the mere inclusion of a scienter element to render unnecessary a clear and precise definition of the offense itself. *Screws* involved the criminal prosecution of a sheriff for the beating and murder of an arrested handcuffed black man. The defendant was charged with acting under color of state law to "willfully" deprive the murder victim of "rights, privileges or immunities secured or protected" to him by the Fourteenth Amendment. The defendant challenged the statute as applied alleging that it was unconstitutionally vague. In the statute at issue in *Screws,* the definition of the offense (i.e., the deprivation of constitutional rights) did not rely upon the scienter requirement. The scienter requirement was relied upon to insure that the defendant knew that a particular constitutional right

existed *and* that he willfully acted to deprive another of that right. "Wilful" scienter is defined in *Screws*:

> When used in a criminal statute it generally means an act done with bad purpose. In that event something more is required than the doing of the act proscribed by the statute. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. And that issue must be submitted to the jury under appropriate instructions.

325 U.S. at 101. (citation omitted). This Court explained that "wilful" scienter may not be used to define the offense, but only to insure that the defendant had knowledge he was engaging in prohibited conduct:

> The requirement that the act must be wilful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain.

325 U.S. at 102.

> . . . [Wilful] conduct cannot make definite that which is undefined. But wilful violators of constitutional requirements, *which have been defined,* certainly are in no position to say they had no adequate notice that they would be visited with punishment. When they act wilfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting they are not punished for violating an unknowable thing. (emphasis added).

325 U.S. at 105. The reasoning assumed that the "constitutional requirements" were clearly and objectively defined, although not necessarily within the four-corners of the statute, and the definition was sufficiently clear to the defendant Screw whose specific conduct showed clearly that he had acted deliberately to violate the law. The statute in the *Screws* case did not rely upon a finding of

secondary intent (defining the offense) *and* a finding of primary intent (intent to do that which the statute proscribes), because the reasoning assumed that the "constitutional requirement," and therefore, the underlying offense, were defined.

In their respected treatise on substantive criminal law, Wayne LaFave and Austin Scott have noted that "the requirement of fair warning is satisfied if a statute suggests the need to seek legal advise and if the statute's meaning might reasonably be determined through such advice" and quote the following:

> "In general, it would seem fair to charge the individual with such knowledge of a statute's meaning and applicability as he could obtain through competent legal advice provided that the statute gives him enough warning that he ought reasonably to see the need of obtaining such advice." Note, 62 Harv. L. Rev. 77, 80 (1948)

W. LaFave, A. Scott, *Handbook on Criminal Law*, §11, p. 86 and n. 25 (1972). The significance of the *Screws* decision is that the defendant, as a police officer, was held to know the scope of his victim's constitutional rights, because, although subject to change, constitutional requirements are defined and may be ascertained through legal advice. The defendant Screws' conduct showed an obvious disregard for an obvious constitutional right—the right to not be beaten to death by a police officer. Unlike the statute at issue in *Screws*, the Hoffman Estates scheme fails to adequately describe the conduct it seeks to punsh.

In *Boyce Motor Lines* v. *United States, supra*, the company was charged with violating the I.C.C. regulation which required drivers of vehicles transporting explosives or inflamables to avoid "so far as practicable, and where feasible", congested thoroughfares and tunnels.

This Court upheld the indictment because the regulation would apply only in cases where the defendant was *aware* of a safer route and *deliberately* took the more dangerous one or where he wilfully neglected to make inquiry about a safer alternate route. LaFave and Scott have commented on *Boyce* as follows:

> But as Justice Jackson correctly pointed out in his dissent, scienter — at least as it has been traditionally defined — cannot cure vagueness in a statute or regulation. One "knowingly" commits an offense when he knows that his acts will bring about certain results (those defined in the statute in question), and whether he knows that deliberately causing such results is proscribed by statute is immaterial. Because it is knowledge of the consequences of one's actions and not knowledge of the existence or meaning of the criminal law which is relevant, it seems clear that uncertain language in a statute is not clarified by the addition of a scienter element. Stated in the context of the *Boyce* case, the fact that a conviction may be had only if it is found that the driver willfully failed to take or discover a safer route "so far as practicable, and where feasible," does not require proof of actual knowledge or understanding of the quoted language and thus does not serve to clarify that language. Or, to put it yet another way, it is possible willfully to bring about certain results and yet be without fair warning that such conduct is proscribed.

Handbook on Criminal Law, §11, pp. 86-87. Both Screws and Boyce Motor Lines were held to know the subject matter of the law, because reasonable inquiry would have made the obvious known to them. The record herein establishes that not even those responsible for the creation, enactment and enforcement of the Hoffman Estates scheme could determine its scope. And, as noted above, *McGowan* v. *Maryland, supra*, is inapplicable in a situation where the merchant is, in effect, compelled to prognosticate the vogues of imagined and purely potential

criminal offenders. *Cf. Music Stop, Inc.* v. *Ferndale,* 488 F.Supp. 390, 393 (E.D. Mich. 1980) (Vague ordinance "does not refer to or permit investigation by a retailer of ordinary intelligence" and "no fixed extrinsic reference point appears to exist which could be relied upon to alert the retailer of ordinary intelligence and prudence.") *accord Magnani* v. *City of Ames,* 493 F. Supp. 1003 (S.D. Ia. 1980).

If the mere addition of an intent element to any vague criminal law could cure vagueness and satisfy the notice requirement of *Grayned,* no law that requires a knowing or intentional violation could ever be considered vague. *Lazy J. Ltd.* v. *Borough of State College, supra, slip op.* at 8 (Appendix of Unreported Decisions—65a). "If intentional conduct could save all statutes from facial invalidity, then the doctrine of facial invalidity could hardly have arisen." *United States* v. *Baranski,* 484 F.2d 556, 566 (7th Cir. 1973).[21] The *Screws* "exception" would swallow the *Grayned* rule. The Appellee submits hypothetically that a cosmetic addition of a scienter requirement to the Milwaukee police disciplinary regulation held unconstitutionally vague in *Bence* v. *Breier, supra,* would not add objective content to the ambiguous language. Such a regulation might provide:

> "If is an offense to *intentionally or knowingly* engage in conduct unbecoming and detrimental to the service."

An individual who acts willfully and deliberately to violate a clearly defined enactment is presumed to have had

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[21] *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U.Penn. L.Rev. 67 (1960), at pg. 87, n.98, for a discussion of the dangers of relying upon intent, or "scienter," to clarify an indefinite law, and the potentially illusory nature of "clarificatory scienter," and *see also Indiana Chapter, N.O.R.M.L.* v. *Sendak,* No. TH 75-142-C (S.D. Ind. 1980), *slip op.* at 15-16 (Appendix of Unreported Decisions—37a).

fair notice of the law; but, where the nature of the proscribed wrong is a matter of speculation, or where the standard of right-wrong is so open-ended and subjective as to be of no assitance, the person of ordinary intelligence is not given fair notice of what is prohibited. Furthermore, such an undefined prohibition "impermissibly delegates basic policy matters to policemen, judges and juries for solution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and selective application." *Grayned* v. *City of Rockford*, 408 U.S. at 109. Because of the uncertain definition of the offense, and the extraordinary reliance upon scienter to define the offense, police officers, prosecutors, judges and juries must speculate as to the state of mind of an individual based on their subjective impressions of the sincerity of his protestations of innocence, and the inevitable result will be discriminatory enforcement based on chance or prejudice. *Gaffey* v. *Babb*, 624 P.2d at 625.

The Appellee respectfully submits that the appellants and Amici have misconstrued the traditional role of a "criminal intent" and have perverted it in an attempt to define the undefinable. To define the offense solely on the basis of a state of mind is a step toward criminalizing "intentionally committing wrongthink" and is totally alien to American jurisprudence. Since virtually anything can be used for an illegal purpose, reliance on subjective intent alone to define the proscribed conduct cannot rationally be urged to cure obvious facial vagueness. (Amicus Brief of Arkansas, *et al.* — 10, 11, 12; Appellants' Brief — 23).

While the Appellee concurs and sympathizes with the concerns expressed in the Amicus Brief filed on behalf of Community Action Against Drug Abuse, it is constrained to note that these concerns must be addressed in

a constitutional manner. One fatal fault in their argument is that they assume precisely what the record controverts: that the merchant or police officer can readily ascertain what items are "designed for use" with illegal drugs, and that such items are readily distinguishable from items which are not. (Amicus Brief of Community Action Against Drug Abuse — 11, 14, 15, 18). This approach has been recognized as circular and has been tacitly abandoned by the Appellants and never adopted by Amicus brief of Arkansas, *et al.* It also has been flatly rejected by the Sixth, Seventh and Eighth Circuits. *Record Revolution No. 6, Inc. v. Parma, supra; Flipside Etc.* v. *Village of Hoffman Estates, supra; Geiger* v. *Eagan, supra.*

Finally, the Appellee notes that the Amicus Brief of Arkansas, *et al.* urges this Honorable Court to address the Model Act in an unrelated case and without the benefit of a record. (Amicus Brief for Arkansas, *et al.* — *passim*). The various states are effectively asking this Court to render an advisory opinion. The Appellee respectfully submits that no case or controversy regarding the Model Act is before this Court as required by Article III, §2 of the United States Constitution. This is also true of the Amicus Brief of the Village of Wilmette. It clearly seeks an advisory opinion on an ordinance about which there is no justiciable issue before this Court. The Appellee therefore respectfully requests that the issues raised therein not be addressed.

CONCLUSION

Wherefore, on the basis of the above, the Appellee, The Flipside, Hoffman Estates, Inc., prays this Honorable Court to affirm the Judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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No. 80-1681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES
ILLINOIS, et al.

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES
INC., an Illinois Corporation

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE APPELLANTS

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November, 1981

APPEAL DOCKETED APRIL 3, 1981
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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Additional Constitutional Provisions, Statutes and Ordinances Involved	iii
Prefatory Note	1
A. Subsequent Legislative Enactment by the Illinois General Assembly	1
B. Severability Clause	3
Argument:	
I. There Is No First Amendment Issue	4
II. There Is Sufficient *Nexus* Between the Items and Illegal Drug Use	6
III. The Merchant's State of Mind Is Relevant	6
Conclusion	13
Appendix	1a

TABLE OF AUTHORITIES

PAGE

Casbah, Inc. v. *Thone*, 651 F. 2d 551 (C. A. 8th, 1981) 5

Bigelow v. *Virginia*, 421 U. S. 809, 95 S. Ct. 2222 (1975) 5

Brache v. *County of Westchester*, 507 F. Supp. 566 (S. D. N. Y., 1981) 6

Cardarella v. *City of Overland Park*, 620 P. 2d 1122 (1980) 6

Central Hudson Gas Corp. v. *Public Service Commission*, 447 U. S. 557, 100 S. Ct. 2343 (1980) 5

Danovitz v. *United States*, 281 U. S. 389, 50 S. Ct. 344 (1930) 8

Direct Sales Company v. *United States*, 319 U. S. 203, 63 S. Ct. 1265 (1943) 8

Franza v. *Carey*, 518 F. Supp. 324 (S. D. N. Y., 1981) 10

Gasser v. *Morgan*, 498 F. Supp. 1154 (N. D. Ala., 1980) 11

Lady Ann's Oddities, Inc. v. *Macy*, 519 F. Supp. 1140 (W. D. Okla., 1981) 5, 11

Music Plus Four, Inc. v. *Barnet*, 170 Cal. Rptr. 2119 (Cal. App., 1980) 12

NORML v. *Sendak*, TH 75-142-C (S. D. Ind., 1980), Appendix of unreported opinions—37a ... 11

Record Revolution No. 6 v. *City of Parma*, 638 F. 2d 916 (C. A. 6th, 1980) 4, 11

Rozner v. *Korshak*, 303 N. E. 2d 389 (Ill., 1973) 2

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 96 S. Ct. 1817 (1976) 5

ADDITIONAL CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Public Act 82-847

AN ACT providing protection for the public health and safety by prohibiting the sale or delivery of tobacco accessories or smoking herbs to minors.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. This Act shall be known and may be cited as the "Tobacco Accessories and Smoking Herbs Control Act".

Section 2. Purpose. The sale and possession of marijuana, hashish, cocaine, opium and their derivatives, is not only prohibited by Illinois Law, but the use of these substances has been deemed injurious to the health of the user.

It has further been determined by the Surgeon General of the United States that the use of tobacco is hazardous to human health.

The ready availability of smoking herbs to minors could lead to the use of tobacco and illegal drugs.

It is in the best interests of the citizens of the State of Illinois to seek to prohibit the spread of illegal drugs, tobacco or smoking materials to minors. The prohibition of the sale of tobacco and snuff accessories and smoking herbs to minors would help to curb the usage of illegal drugs and tobacco products, among our youth.

Section 3. Definitions. The following definitions shall apply to this Act: (a) "Tobacco accessories" shall mean cigarette papers, pipes, holders of smoking materials of all types, cigarette rolling machines, and other items, designed

primarily for the smoking or ingestion of tobacco products or of substances made illegal under any statute or of substances whose sale, gift, barter, or exchange is made unlawful under this Act.

(b) "Smoking herbs" shall mean all substances of plant origin and their derivatives, including but not limited to broom, calea, California poppy, damiana, hops, ginseng, lobelia, jimson weed and other members of the Datura genus, passion flower and wild lettuce, which are processed or sold primarily for use as smoking materials.

Section 4. Offenses. (a) Sale to Minors. No person shall knowingly sell, barter, exchange, deliver or give away or cause or permit or procure to be sold, bartered, exchanged, delivered, or given away tobacco accessories or smoking herbs to any person under eighteen years of age.

(b) Use of Identification Cards. No person in the furtherance or facilitation of obtaining smoking accessories and smoking herbs shall display or use a false or forged identification card or transfer, alter or deface an identification card.

(c) Warning to Minors. Any person, firm, partnership, company or corporation operating a place of business wherein tobacco accessories and smoking herbs are sold or offered for sale, shall post in a conspicuous place upon the premises a sign upon which there shall be imprinted the following statement, "SALE OF TOBACCO ACCESSORIES AND SMOKING HERBS TO PERSONS UNDER EIGHTEEN YEARS OF AGE OR THE MISREPRESENTATION OF AGE TO PROCURE SUCH A SALE IS PROHIBITED BY LAW". Such a sign shall be printed on a white card in red letters at least one-half inch in height.

Section 5. Penalty. Any person who shall knowingly violate, or shall knowingly cause the violation of any provision of this Act shall be guilty of a Class C misdemeanor.

GEORGE H. RYAN SR.
Speaker, House of Representatives

PHILIP J. ROCK
President of the Senate

APPROVED
this 15th day of September, 1981 A.D.

JAMES R. THOMPSON
Governor

* * *

HOFFMAN ESTATES MUNICIPAL CODE

Section 1-1-9—Severability of Parts of Code.

The sections, paragraphs, sentences, clauses and phrases of this code are severable, and if any phrase, clause, sentence, paragraph or section of this code shall be declared unconstitutional, invalid or unenforceable by the valid judgment or decree of a court of competent jurisdiction, such unconstitutionality, invalidity or unenforceability shall not effect any of the remaining phrases, clauses, sentences, paragraphs and sections of this code.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES
ILLINOIS, et al.

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES
INC., an Illinois Corporation

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF AND ARGUMENT FOR THE APPELLANT

Prefatory Note

A. Subsequent Legislative Enactment by the Illinois General Assembly

On September 15, 1981, House Bill 1632, the "Tobacco Accessories and Smoking Act" was signed into law to be effective January 1, 1982. The Act has no applicability to the Village of Hoffman Estates or the subject ordinance.

A "Model Act" form known as the "Drug Paraphernalia Control Act" was originally proposed in the Illinois General Assembly. It included the clause: "The authority granted under

this subsection shall extend to all units of local government whether home-rule or non home-rule". This clause was deleted in the bill that was passed.

The effect of the deletion under Illinois law is to *not* extend the "Tobacco Accessories and Smoking Herbs Control Act" to home-rule municipalities. Hoffman Estates, with a population of over 38,000 is and has been since home-rule was created by the 1970 Illinois Constitution, a home-rule municipality. The Illinois Supreme Court has made it very clear that the General Assembly must expressly declare that a law applies to a home-rule municipality. The Court said in *Rozner* v. *Korshak*, 303 N. E. 2d 389 (Ill., 1973) at 391-392:

> "While Section 6(q) of Article VII authorizes the General Assembly, by a law approved by three-fifths of the members of each house, to deny or limit the power of a home-rule unit, it does not follow that every statute relating to the powers of municipalities generally will, if adopted by a three-fifths vote, have a bearing upon the powers of those municipalities which are home-rule units. The powers which those units have received under Section 6 of Article VII of the Constitution of 1970 are in addition to the powers heretofore or hereafter granted by the General Assembly to other municipalities. The kind of inadvertent restriction of the authority of home-rule units for which the plaintiff contends can be avoided if statutes that are intended to limit or deny home-rule powers contain an express statement to that effect. The statute before us contains no indication of a restrictive purpose, and we hold that it had no restrictive effect."

Counsel for Appellee concurs that the elimination of the specific applicability to home rule units in House Bill 1632 limits the applicability House Bill 1632 to non home-rule municipalities.

B. Severability Clause

The subject ordinance is part of a Municipal Code. The ordinance itself does not contain a severability clause because such clause is contained in the Hoffman Estates Municipal Code at Section 1-1-9 (page v). This clause has applicability to all codified ordinances.

ARGUMENT

I. There Is No First Amendment Issue

The Appellee, Flipside, has interjected First Amendment issues in its argument (Brief and Argument for the Appellee, pages 25-26) which are not part of the Question Presented. Appellant argues that First Amendment issues are appropriate since the standard of review may be effected. The United States District Court rejected the First Amendment applicability argument since the ordinance did "not purport to prohibit advertisement or the expression of commercial ideas" (Juris. St. at 40a). The United States District Court did nonetheless consider, *arguendo*, that "marketing" is a form of advertising and found that licensing would be a reasonable regulation of commercial speech (Juris. St. at 41a). The United States Court of Appeals did not reach the First Amendment issue and expressed no opinion (Juris. St. at 26a).

The "Model Act" has been found violative of the First Amendment because of a broad advertising restriction embodied in the "Model Act" in one Circuit opinion. The issue was discussed in *Record Revolution No. 6* v. *City of Parma*, 638 F. 2d 916 (C. A. 6th, 1980), at page 937:

> "The cities can legitimately protect their citizens from the use, sale or manufacture of 'drug paraphernalia' within city limits. However, an impenetrable wall against the free flow of commercial speech cannot be erected around the cities' residents. The cities' interest in regulation of advertising is limited to preventing the sale of drug paraphernalia inside their municipal boundaries. Their legitimate interest does not include regulating the information heard or read by their citizens about the availability of legal 'drug paraphernalia' in other locales."

No such limitation on advertising is contained in the subject ordinance.

In a test of Oklahoma's "Model Act", the Court recognized that the Legislature deleted the advertisement prohibition and said:

> "Commercial speech has been defined alternately as 'expression related solely to the economic interests of the speaker and its audience', and 'speech proposing a commercial transaction'. See *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U. S. 557, 561 562 100 S. Ct. 2343, 2349, 65 L. Ed. 2d 341 (1980). In the present case, the Act bans the sale and possession of items used or intended for the use with controlled dangerous substances. However, the legislature deleted the provisions of the Model Act prohibiting the advertisement and promotion of 'drug paraphernalia.' " *Lady Ann's Oddities, Inc.* v. *Macy*, 519 F. Supp. 1140 (W. D. Okla., 1981) at 1157.

The Nebraska "Model Act" retained the advertising prohibitions but the Eighth Circuit, after considering *Central Hudson Gas Corp.* v. *Public Service Commission*, 447 U. S. 557, 10 S. Ct. 2343 (1980), *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 96 S. Ct. 1817 (1976) and *Bigelow* v. *Virginia*, 421 U. S. 809, 95 S. Ct. 2222 (1975) concluded that advertising promoting the sale of drug paraphernalia is not protected speech. *Casbah, Inc.* v. *Thone*, 651 F. 2d 551 (C. A. 8th, 1981).

That advertising promoting illegal activity is not protected speech is clear but Appellee's argument extends itself to the display of items. The display is the key factor in the determination of "marketing for use" in the subject ordinance. If "display" is to be considered First Amendment expression, then it is not protected expression since it now is commercial expression promoting illegal activity.

The United States District Court in New York found a "Model Act" ordinance vague but discussed First Amendment issues. The ordinance deleted advertising but included the "Model Act" factors such as "national and local advertising

concerning its use" and the "manner in which the object is displayed". The Court found on the First Amendment challenge "no basis to consider it". *Brache* v. *County of Westchester*, 507 F. Supp. 566 (N. Y. 5th, 1981); reversed on standing issue, ___ F. 2d ___ (C. A. 2d—Case No. 81-2711, 1981), at 584.

The issue of "display" of drug paraphernalia as a First Amendment exercise was discussed by the Supreme Court of Kansas in *Cardarella* v. *City of Overland Park*, 620 P. 2d 1122 (1980). They said of "display" at page 1132:

> This is not commercial advertising—only the physical placement of items on the business permises is involved. This is not commercial speech. The only case dealing with this issue that has been located is *Tobacco Road* v. *City of Novi*, 490 F. Supp. 537 (E. D. Mich., 1980), which reaches this same result at 544-545. We must conclude the ordinance does not violate any First Amendment right of commercial speech."

"Display" which is a "Model Act" factor has not been considered for First Amendment protection by any Court hearing such cases and should not be an issue here since it is not an issue before the Court.

II. There Is Sufficient *Nexus* Between the Items and Illegal Drug Use

The Appellee's Brief discusses contraband *per se* and derivative contraband. The second "WHEREAS" of the subject ordinance recognizes the items as legal retail items and in no manner declares such items contraband or provides for seizure for possession or sale of such items. It is conceded that by design intent or marketing intent, the items become the subject of licensing by their now presumed derivative use. The analogies to prove this logical and rational presumption are not unlike the evidence used to prove derivative contraband (burglar tools, gambling devices, bootlegging implements, and the like) in criminal cases.

At page 3 and 4 of Appellee's Brief, four situations are discussed where the *nexus* requirement has been met to establish that a neutral tool may be inferred to be a burglar tool. Appellant Village does not deny that a *nexus* must be met to demonstrate that items "are more likely than not" to be used with illegal drugs. The Village did in fact present evidence that items of the type marketed at Flipside were being primarily used with illegal drugs (J. A. 51-52).

In the common experience of man, it is naive and illogical to make any other conclusion but that items of the type presented as exhibits and marketed together by Flipside are intended for any use other than illegal drugs. They are, therefore, derivatively subject to licensing as drug paraphernalia.

At page 9 of Appellee's Brief, they said:

> "Burdening lawful objects with the label of 'instrumentality of crime' without first establishing the criminal *nexus* is unprecedented in the law and can find no support in the other forms of 'paraphernalia' laws discussed herein. It is obvious that no merchant of crow bars or copper tubing could allege standing to challenge as facially vague a burglary tool statute or a bootlegging paraphernalia statute without first being subject to prosecution."

We disagree with this premise. If in fact the retailer promoted his crow bars with literature on how to break into homes, displayed it with lock picks, alarm diverters and construction diagrams, it would be naive and illogical to make any other conclusion but that the items had now become derivative contraband. The *nexus* can be made in drug paraphernalia and burglar tools in numerous ways but in this case, we are dealing with a retailer and the evidence of *nexus* must be determined in the retail setting and marketing choice made by the retailer.

The retail analogy that Appellee rejects was upheld in *Danovitz* v. *United States*, 281 U. S. 389, 50 S. Ct. 344 (1930) where forfeiture of the Feitler Bottle Company's contraband under the National Prohibition Act was upheld. Justice Holmes said of "manufacture" and the method of sale at 281 U. S. 396, 397:

> "The argument for the petitioner cannot be helped by amplification. It is obviously correct if the word 'manufacture' be taken in the strictest and most exact sence. But the word may be used in a looser way to express the whole process by which an article is made ready for sale on the open market. . . . We are of opinion that the word was used in this looser way, and that if the empty containers and the other objects seized were offered for sale in such a mode as purposely to attract purchasers who wanted them for the unlawful manufacture, as we interpret the word, they were designed for that manufacture and could be seized.

A case with application here is *Direct Sales Co.* v. *United States*, 319 U. S. 703, 63 S. Ct. 1265 (1943). In that case, defendant, a registered drug manufacturer and wholesaler, claimed that its mere sale of narcotics to a physician was insufficient evidence of conspiracy to sell narcotics outside the legitimate practice of the profession. Direct Sales was convicted as the Court found that legal narcotics could become illegal narcotics if a *nexus* could be proved beyond a reasonable doubt that legal items were being put to illegal use. The Court said at 319 U. S. 710:

> "All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use then unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade."

and at 319 U. S. 711:

> "Additional facts, such as quantity sales, high pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise.

The *nexus* in the Hoffman Estates case is the technique of marketing that clearly demonstrates the seller knows the buyer intends to use the items with illegal drugs and markets accordingly.

Appellee summarizes the paraphernalia cases and states at page 2 of his brief:

> "The derivative contraband/per se contraband distinction has been the conceptual underpinning of all laws which have attempted to attach penalties for the possession of instrumentalities of crime. Traditionally, the *criminalization* of 'paraphernalia' has relied upon this distinction, and 'paraphernalia' laws have historically been enforced only in one of two limited circumstances: either where an object is determined to be intrinsically well-suited for use in crime, having no significant lawful use and being readily distinguishable from objects not inherently sinister; or, where an object, otherwise lawful, has been found in an actual association with ongoing or consummated criminal activity." (Emphasis added)

The issue for this Court to determine is whether a *Danovitz* display is sufficient *nexus* to determine that such items "more likely than not" will be used with illegal drugs—the actual association with criminal activity.

The Village's ordinance is not "criminalization" but licensing. There can be no reasonable doubt in the mind of Appellant that a person of common experience or a retailer of "tobacco accessories" or a United States District Court Judge or a United States Supreme Court Justice who walks into Flipside

or any "headshop" can come to any other logical conclusion but that the displayed items are marketed, displayed and offered in such a mode to encourage the use and be used with illegal drugs and are therefore derivative items subject to licensing.

III. The Merchant's State of Mind Is Relevant.

Appellee Flipside argues that the Village's "designed for use" and "marketed for use" phrases are not related to the merchant's state of mind (Appellee's Brief, p. 42 et. seq.). A July 17, 1981 opinion of the United States District Court for the Southern District in New York published only recently contains an illuminating discussion on that issue wherein the cases of precedent as cited in the Briefs herein and two theories in regard to the issue of intent in paraphernalia cases are analyzed. The case is *Franza* v. *Carey*, 518 F. Supp. 324 (S. D., N. Y.—1981) wherein the New York "Model Act" was tested for constitutionality. It differs from the DEA "Model Act" in that penalties are civil, guidelines for definition of paraphernalia are omitted, advertisement prohibitions are omitted, special violations for minors are omitted and it defines the violation on the bases of *apparent* intent rather than actual knowledge. It is this last point that is discussed at pages 333-338.

That Court's current and pertinent discussion is attached as an Appendix herein. The opinion that " 'designed for the purpose' refers to the subjective intent of the alleged violator rather than to the physical characteristics of a particular item", 518 F. Supp. at 335, is precisely the point this Appellant has argued should be the test. In the Hoffman Estates ordinance, only the retailer can possibly be in violation as no presumed intent is placed on the purchaser or possessor. The New York statute was held unconstitutionally vague because although paraphernalia was properly defined by the retailer's state of mind, a possessor could be found guilty without reference to

said possessor's state of mind. Such would not be the case herein as the ordinance is limited to the merchant only.

Another excellent discussion of "intent" was made in *Gasser* v. *Morgan*, 498 F. Supp. 1154 (N. D., Ala.—1980) where the Court said it may imply specific *mens rea* even in the absence of any expression of intent.

They said at 498 F. Supp. 1163:

> "Merely designing, marketing, or selling the item is not sufficient to make it 'drug related' under the statute. Something in addition to doing one of those physical acts is required, i.e., the physical acts must be done for a bad purpose. A bad purpose is a mental element. The bad purpose required is that the items be useful primarily for taking, concealing, etc., illegal drugs. When a bad purpose must be proved before a person can be convicted of a crime, a statute is said to require a specific intent. The criminal purpose in the Alabama statute is akin to criminal solicitation, and it involves the glamorization, facilitation and encouragement of drug use."

The Hoffman Estates ordinance defines the "use" that the items are designed for or marketed for as a "use" with illegal drugs which is the bad purpose to which *Gasser* addresses as the basis for implied intent.

Another July, 1981 case dealt with intent. It was *Lady Ann's Oddities, Inc.* v. *Macy*, 519 F. Supp. 1140 (W. D., Okla.—1981). The Court considered and rejected some of the same cases cited by Appellee in their Brief to support the argument that the Hoffman Estates ordinance is a strict liability system and the merchant's state of mind is irrelevant. These common cases include *Record Revolution No. 6* v. *City of Parma*, 638 F. 2d 916 (C. A. 6th—1980); *NORML* v. *Sendak*, TH 75-142-C (S. D., Ind.—1980—Appendix of unreported decisions—37a). The Court found a "responsibility to give the statute a constitutional construction if possible" 519 F. Supp. at

1149. Further, they found that "designed for" refers to intent, not structure.

A California Appellate Court ruled a paraphernalia sales ban to minors constitutional and its language sums up the interconnection for the presumptive intent and nexus arguments very well. They said in *Music Plus Four, Inc.* v. *Barnet*, 170 Cal. Rptr. 419 (Cal. App.—1980) as follows:

> "A teaspoon in a room displaying housewares could not reasonably be found to be displayed for the purpose of sale for consuming drugs or narcotics. Conversely, a teaspoon in a record store at least suggests that the display is for sale for some purpose other than eating. Moreover, the display of a teaspoon along with water pipes, roach clips, and cigarette papers specifically designed for smoking marijuana, leaves no doubt about the purpose for which the displayed items are offered for sale." 170 Cal. Rptr. at 428.

This is the simple and logical argument the Village has made throughout the proceedings. The ordinance was carefully drawn to avoid First Amendment issues, transfer of intent issues, and vague definitional issues. It may well lack perfect precision but all this Court requires is that the language convey sufficient warning of the proscribed conduct.

CONCLUSION

The Judgment of the Seventh Circuit Court of Appeals, insofar as it reversed the decision of the United States District Court, should be reversed.

Respectfully submitted,

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November, 1981

APPENDIX

***FRANZA v. CAREY*, 518 F. SUPP. 324 (S.D.N.Y.—1981) pp. 334-338.**

Therefore, in the context of the present case, due process requires that the Statute (1) make reasonably clear to persons affected what conduct constitutes a violation, and (2) provide sufficient enforcement standards to prevent arbitrary and discriminatory enforcement. *See The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, supra,* 639 F.2d at 377-79, 383; *Housworth v. Glisson, supra,* 485 F.Supp. at 36-38.

With the above principles in mind, the Court turns to plaintiffs' vagueness arguments. Plaintiffs contend that the "designed for the purpose" language in section 850(2) is impermissibly vague since that phrase refers to unspecified physical characteristics of an item or the intended purpose of its designer or manufacturer. Defendants, however, contend that the words "designed" and "purpose" are equivalent to "intent" and therefore that drug-related paraphernalia is defined by the alleged violator's intent for the item to be used for one of the drug-related purposes enumerated in section 850(2). They further argue that this scienter requirement provides both an ascertainable standard of liability and fair notice to those affected by the Statute of the prohibited conduct.

The Court agrees that a statute which is otherwise vague may be saved by the inclusion of such a scienter or *mens rea* requirement. *See United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952); *Record Revolution, supra,* 638 F.2d at 934.—Moreover, a statute need not use the word "intent" since knowledge as an element of the violation may be deemed the equivalent of intent. *Brache v. County of Westchester, supra,* 507 F.Supp. at 575; *Gasser v. Morgan,* 498 F.Supp. 1154, 1159 (N.D.Ala.1980). Therefore, the Court must determine whether

the "designed for the purpose" definition indeed creates such a scienter requirement when considered together with the "circumstances evincing knowledge" standard of section 851.

Courts that have considered the Model Act's similar "designed for use" language are divided as to its constitutionality. Some courts, having determined that "designed" refers to the physical characteristics of an item, have found the definition impermissibly vague since it does not include specific design characteristics that distinguish drug-related from non-drug-related items. *See, e. g., Record Revolution, supra,* 638 F.2d at 930; *Weiler v. Carpenter, supra,* 507 F.Supp. at 843. *See also The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, supra,* 639 F.2d at 380-81. Other courts adopt the subjective, intentional sense of the word "designed." *See, e. g., The Casbah, Inc. v. Thone,* 651 F.2d 551, at 560 (8th Cir. 1981); *Brache v. County of Westchester, supra,* 507 F.Supp. at 577; *New England Accessories Trade Ass'n v. Browne, supra,* 502 F.Supp. at 1251; *Mid-Atlantic Accessories Trade Ass'n v. Maryland, supra,* 500 F.Supp. at 845; *Delaware Accessories Trade Ass'n v. Gebelein,* 497 F.Supp. 289 (D.Del. 1980).

The reasoning of two decisions is illustrative of the basis for these different opinions. In *Record Revolution,* the Sixth Circuit considered the constitutionality of three local ordinances which were almost identical to the Model Act. *See* 638 F.2d at 921-22. In discussing plaintiffs' vagueness challenge, the Court of Appeals found that the statutory terms "used" or "intended for use" are not vague or overbroad. *Id.* at 929. The Court, however, reached the opposite conclusion with respect to the phrase "designed for use":

> "The term 'designed' could signify only devices that have no use or function other than as a means to ingest the controlled substance. Alternatively, 'designed' could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term 'designed' could sweep into the

> definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. . . ."
>
> Vagueness enters in our case once the ordinances begin to define drug paraphernalia in terms of the primary adaption or dominant purpose of the design. Then the definition begins to depend upon the ingenuity or purpose of the purchaser rather than the seller and upon the current practices of the clandestine society of drug users.
>
> The major ambiguity in defining drug paraphernalia in terms of the "design" of items is the lack of any design characteristics that distinguish lawful purposes from unlawful purposes. The type of object that can become, or be used as, drug paraphernalia is limited only by the imagination of the user. The record in our cases established the absence of any unique design characteristics.

Id. at 930-31 (citations and footnote omitted) (quoting *Indiana Chapter, NORML, Inc. v. Sendak*, No. TH 75-142-C, slip op. at 13 (S.D. Ind. Feb. 4, 1980) (3-judge district court), *vacated as moot at the time of appeal*, No. 80-1305 (7th Cir. July 22, 1980)).

The district court in *Mid-Atlantic Accessories Trade Association v. Maryland*, however, gave a contrary interpretation to the same language in the Model Act:

> "Design" connotes an intentional act as well as an objective set of characteristics. When considered in the context of this statute, it is clear that it is the subjective, intentional sense in which "designed" is used.
>
> The fact that "designed for use" and "intended for use" are used in the disjunctive throughout the Act does not necessarily indicate that each of the two phrases means something entirely different. Rather, it is apparent from a reading of the Act in its entirety that all three verbs (i. e. used, designed and intended) were included in the definition of drug paraphernalia so that the terms would be applicable to all the kinds of conduct barred in the Act's substantive sections. A seller will "intend" an item for use,

while a manufacturer is more likely to "design" an item for use, and a user will simply "use" the item.

500 F.Supp. at 844-45.[16]

Having carefully considered the reasoning of both interpretations as well as the distinctive features of the Statute when compared to the Model Act, the Court finds that "designed for the purpose" refers to the subjective intent of the alleged violator rather than to the physical characteristics of a particular item. Even though scienter requirements are not as prevalent in civil statutes as in criminal enactments and section 850 omits the fourteen enforcement guidelines that clearly focus upon the intent of the alleged violator, the Statute's definition of drug-related paraphernalia is obviously adapted from the Model Act. Therefore, the following comments of the Model Act's drafters are relevant in determining the intended meaning of the definition adopted by the New York legislature:

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[16] Judge Robinson subscribed to a similar interpretation in *The Casbah, Inc. v. Thone,* 512 F.Supp. 474 (D.Neb.1980), *rev'd in part on other grounds,* 651 F.2d 551 (8th Cir. 1981):

> "Designed for use" . . . refers not to the physical characteristics of an object, but to the subjective intent or plan of the person controlling the object. The whole tenor of the statute makes clear that any object, *depending upon its use,* can be drug paraphernalia. In fact, section two of the statute sets out fourteen factors which are to be considered in determining if any given object is paraphernalia; those factors focus not on the physical features of the suspected item but on the context in which the item is found. The factors are an aid in determining whether a person "designed" the object as paraphernalia. The physical properties of an item may not offer a clue about its illicit use. As the court in *Delaware Accessories Trade Assn. v. Gebelein,* [497 F.Supp. 289, 291] (D.Del.1980) said "the statute itself indicates that 'designed for use' refers not to structure but to intent." In short, when "designed for use" is integrated into the statute it is not vague nor even easily succeptible to misunderstanding.

At 482. *See generally* Note, *Anti-Drug Paraphernalia Laws: Void for Vagueness?* 61 B.U. L.Rev. 453 (1981).

> To insure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge or criminal intent of the person in control of an object a key element of the definition. Needless to say, inanimate objects are neither "good" or "bad," neither "lawful" nor "unlawful." Inanimate objects do not commit crimes. But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people subjected to prosecution. . . .
>
> Consider the application of Article I to a spoon, a hypodermic syringe, and a length of surgical tubing. Each object has legitimate uses in the community. None is specifically designed for illegal use. Thus, when these objects are manufactured, delivered and possessed in lawful commerce, they are not considered paraphernalia. But, if these same objects are assembled and used by an addict to illegally melt heroin and inject it into his body, they become drug paraphernalia. . . .
>
> Actual use of an object to produce, package, store, test or use illicit drugs need not always be shown. An object is considered to be drug paraphernalia whenever the person in control intends it for use with illicit drugs. . . . It should be noted that the person in immediate control of an object need not intend to use it personally in connection with drugs. It is enough if he holds the object with the intent to make it available to persons whom he knows will use it illegally. . . .

Comments at 6-7, Model Drug Paraphernalia Act (August, 1979) (citations omitted).

Although in the context of the Model Act "designed" may have been intended to refer to the subjective intent of a manufacturer of drug paraphernalia,[17] in the context of the

---

[17] The Court recognizes that portions of the comments to the Model Act could be relied upon to support other interpretations of the phrase "designed for use":

> Objects whose sole, or at least dominant purpose is to produce, package, store, test or use illicit drugs are considered to

(Footnote continued on following page)

Statute, which does not seek directly to regulate the activities of manufacturers, the conclusion that "designed for the purpose" refers to the subjective intent of the person charged with a violation is consistent with the ordinary meaning of "designed."[18] Moreover, section 850 does not utilize "designed for the purpose" in the disjunctive with "intended for the purpose" or "intended to be used," which might have suggested that "designed" was used in a sense other than referring to subjective intent. This interpretation is consistent with a prior version of Article 39 which defined drug-related paraphernalia as items "used or intended to be used" for one of a number of drug-related purposes. *See* 1980 N.Y. Laws, c. 811, § 850. Similarly, Governor Carey's statements upon signing the bill creating Article 39 indicate that the legislature considered the intent of the person charged to be a critical element:

> These bills would add a new Article 39 to the General Business Law to prohibit the possession and sale of

---

(Footnote continued from preceding page)

> be "designed" for such use. A rebuttable presumption exists that these objects are intended for use for the purpose for which they are designed. *See Israel v. United States*, 63 F.2d 345 (3rd Cir. 1933). As such, they are presumed to be drug paraphernalia. Isomerization devices designed for use in increasing the THC content of marihuana provide a good example.

Comments at 7-8, Model Drug Paraphernalia Act (August 1979). Similarly, one of the state's enforcement officers, David A. Solomon, Director of the Division of Food & Drug Protection of the New York State Department of Health, at times discussed "designed" in terms of the designer's intention or the design characteristics of an item although recognizing that the intended purpose of the individual charged is an element of the definition of drug paraphernalia. *See* Transcript of Proceedings, *Brache v. Carey* at 46, 94-95. 80 Civ. 4311 (JMC) (Dec. 10, 11, 12, 1980) [hereinafter "R"]. The Court, however, is not bound by Solomon's interpretation of the statutory language. *World Imports, Inc. v. Woodbridge Township, supra*, 493 F.Supp. at 431.

[18] "Designed" is defined as "made as done by design; intended; planned." *See* The Random House College Dictionary (1973 ed.).

> paraphernalia *intended to be used* for growing, manufacturing, ingesting or enhancing the use of controlled substances or marijuana.
>
> . . .
>
> In order to meet constitutional standards, the legislation seeks not to regulate mere possession or sale of such paraphernalia, but rather is directed at possession and sale thereof with *the intention that such items be used for a drug-related purpose.* Violations would result in civil sanctions, including forfeiture of the violator's license to do business and imposition of a penalty of between $1,000 and $10,000.

Executive Memorandum on Approving 1980 N.Y. Laws, cs. 811 and 812 (June 30, 1980) (emphasis added). Having found that the phrase "designed for the purpose" is used in the subjective, intentional sense, the Court concludes there is no merit to plaintiffs' argument that the definition of drug-related paraphernalia refers to the "design" or intent of a remote manufacturer, seller or purchaser rather than the individual or entity charged with a violation. *See Record Revolution, supra,* 638 F.2d at 928-29; *New England Accessories Trade Ass'n v. Browne, supra,* 502 F.Supp. at 1251; *Mid-Atlantic Accessories Trade Ass'n v. Maryland, supra,* 500 F.Supp. at 844.[19] Given the

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[19] In *Hejira Corp. v. MacFarlane,* ____ F.2d ____, No. 80-2062 (10th Cir. May 5, 1981), the Tenth Circuit considered the constitutionality of a drug paraphernalia statute that defines paraphernalia as an item "primarily adapted, designed and intended for" one of four drug-related purposes. The statute also contains eleven factors for courts to consider in determining whether an item is drug paraphernalia, which were culled from the fourteen enforcement guidelines contained in the Model Act. The substantive criminal offenses prohibit both the possession of paraphernalia with intent to use it in violation of the law and the manufacture, sale or delivery of drug paraphernalia with intent that the item be used as drug paraphernalia.

The district court found the statute vague on its face because the phrase "primarily adapted, designed and intended" considered con-

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fact that many forms of drug paraphernalia have legitimate as well as drug-related uses, the Court further concludes that it

(Footnote continued from preceding page)

junctively, failed to give an individual of ordinary intelligence an opportunity to know what is prohibited and because the statute failed to provide that enforcement officers as well as the courts should consider the eleven enforcement factors. The district court, therefore, found a danger of arbitrary and discriminatory enforcement since the statute allowed police too much discretion in enforcement.

The Tenth Circuit reversed, finding that although the district court correctly concluded that the words "primarily adapted, designed and intended" had to be considered conjunctively, the definition could be saved by severing the word "adapted" which the court found inconsistent with the terms "designed" and "intended." The court of appeals discussed the meanings given to the term "designed" by courts considering the Model Act. Although the court appeared to conclude that "designed" referred to the subjective intent of an individual rather than to the physical characteristics of the item and found that "intended" referred to the subjective intent of the individual charged with the offense, it declined to decide whether "designed" also referred to the intent of the individual charged. The court reasoned that since the phrase "primarily designed and intended" must be considered conjunctively, the subjective intent of the alleged violator is an element of the definition of paraphernalia regardless of the interpretation the state courts give to the term "designed." In addition, the Tenth Circuit found that the alleged violator's subjective intent that the item be used for a drug-related purpose is an element of the substantive offenses, and that the eleven enforcement factors were part of the definition of paraphernalia and provided sufficient guidance to law enforcement officers in objectively determining what items constitute drug paraphernalia.

The Court agrees with the Tenth Circuit that the definition of drug paraphernalia must provide fair notice to those affected by making the subjective intent of the individual charged an element of the definition as well as by including objective standards to guide enforcement officers in assessing whether a particular item is drug paraphernalia. The Court, however, does not share the Tenth Circuit's uncertainty regarding whether "designed" refers to the intent of the individual charged. The Court finds that "designed," like "intended," refers to the intent of the person charged. The testimony

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would be futile to attempt to define drug paraphernalia by reference to the specific physical attributes of the item. Therefore, the Court perceives no constitutional impediment to defining drug paraphernalia in terms of the alleged violator's subjective intent that the item be used for a drug-related purpose since the individual is no doubt aware of his own intentions and thus has reasonable notice that his conduct falls within the prohibition of the Statute.[20]

(Footnote continued from preceding page)

of enforcement officer Solomon in this regard is consistent with the Court's conclusion. Solomon testified that he would consider the intentions of a design or purchaser of an item, only if communicated to the seller, as relevant evidence in determining the seller's intent. *See* R. at 92-93.

[20] Even when the definition of drug paraphernalia incorporates such a scienter requirement, however, to prevent arbitrary enforcement the legislation must include objective enforcement guidelines by which enforcement officers can assess the subjective intent of the alleged violator. *See Hejira Corp. v. MacFarlane, supra.*

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No. 80-1681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, *et al.*,
Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
an Illinois Corporation,
Appellee.

On Appeal From The United States Court
Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF AMERICAN BUSINESSES FOR CONSTITUTIONAL RIGHTS

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Introductory Statement	1
Interest of Amicus Curiae	2
Summary of Argument	3
Argument	6
Conclusion	28

TABLE OF AUTHORITIES

Cases

A. B. Small Company v. American Sugar Refining Company, 267 U.S. 233 (1925)	6
Baggett v. Bullitt, 377 U.S. 360 (1964)	10,13
Cantwell v. Connecticut, 310 U.S. 296 (1940)	13
Carlson v. People of State of California, 310 U.S. 106 (1940)	6
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)	7,12,26
Flipside, Hoffman Estate, Inc. v. Village of Hoffman Estates, et al., 639 F.2d 373 (7th Cir. 1981)	1
General Stores, Inc. v. City of Albuquerque, No. 81-0027-M (D.N.M. March 24, 1981)	25
Grayned v. City of Rockford, 408 U.S. 102 (1972)	4,6

Indiana Ch., NORML v. Sendak, No. Th 75-142-C (S. D. Ind. February 4, 1980) 17,20

Lazy J. Ltd. v. Borough of State College, No. 80-1167 (M.D. Pa. January 30, 1981)..... 17,25

Magnani v. City of Ames, Iowa, 493 F.Supp. 1003 (S.D. Iowa 1980) 19

McGowan v. Maryland, 366 U.S. 420 (1960)..... 19

Music Stop, Inc. v. City of Ferndale, 488 F.Supp. 390 (E.D. Mich. 1980)..... 19

People v. Fogelson, 145 Cal.Rptr. 542, 577 P.2d 677 (1978) 13

Police Dept. of City of Chicago v. Mosely, 408 U.S. 92 (1972) 14

Record Revolution No. 6 v. City of Parma, 638 F.2d 916 (6th Cir. 1980) 18

Screws v. U.S., 325 U.S. 91 (1945) 16,19

Shelton v. Tucker, 364 U.S. 479 (1959) 7,12

Smith v. California, 361 U.S. 147 (1959) 12,26

The Town Tobacconist, et al. v. Degnan, No. 81-0027-M (Superior Court, N.J., March 12, 1981) 25

Tinker v. Des Moines Community School District, 393 U.S. 503 (1969) 14

Weiler v. Carpenter, No. 80-637-JB (D.N.M. Feb. 11, 1981)..... 25

Statutes

18 U.S.C. § 52 19

Village of Hoffman Estates Ordinance No. 969-1978.... 3,7,15

Miscellaneous

Black's Law Dictionary 1391 (4th ed. 1968)..... 23

26 Minn.L.Rev. 661 (1942)..... 26

Webster's Third New International Dictionary 1828 (1976) 23

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BRIEF AMICUS CURIAE OF AMERICAN BUSINESSES FOR CONSTITUTIONAL RIGHTS

INTRODUCTORY STATEMENT

This brief is filed pursuant to Rule 36(2) of the Rules of the Supreme Court of the United States by Amicus American Businesses for Constitutional Rights, an unincorporated trade association consisting of approximately 75 retailers, manufacturers and distributors of various decorative and novelty items and smoking accessories, some of which may be items intended to be regulated by the various drug paraphernalia statutes which have recently arisen. The various members of Amicus also sell, distribute and display books, magazines and other constitu-

tionally protected literature. Amicus' business activities may be affected by the Court's decision in this matter. American Businesses for Constitutional Rights is appearing as amicus curiae in support of the position taken by The Flipside, Hoffman Estates, Inc., the Appellee in this cause.

Verbal consent to the filing of this brief Amicus Curiae has been obtained from counsel for both parties and, written consent, if not already lodged with the Clerk of the Supreme Court of the United States, is in the process of being so filed.

INTEREST OF AMICUS CURIAE

As noted in the introductory statement, Amicus is an unincorporated trade association made up of approximately 75 manufacturers, retailers, and distributors of smoking accessories, decorative and novelty items, books and magazines. Amicus is greatly concerned by recent legislation such as the ordinance of Hoffman Estates at issue in the instant case, which attempts to penalize, or in other manners affect, the free exercise of First Amendment rights of merchants to stock, sell, display or publicize constitutionally protected literature. Further, Amicus believes that legislation, such as the ordinance at issue, which requires a merchant to keep a log book, open to the police, in which the merchant must record the name and address of the purchaser, along with the description and quantity of the item purchased is an unwarranted intrusion into the business lives of merchants who deal in articles that are not inherently dangerous to human nature. Because of the multi-use nature of most items sought to be regulated under the Hoffman Estates Ordinance, Amicus seeks to have the Court uphold the decision of the Seventh Circuit Court of Appeals below.

Due to the vague manner in which the ordinance attempts to define the conduct which it regulates, Amicus is concerned that merchants will be unable to discern which activities may require the issuance of a license. Inability to distinguish between

regulated and unregulated conduct invites arbitrary and discriminatory enforcement based on the personal values, aesthetic tastes and prejudices of those charged with enforcement of the ordinance. Absent viable enforcement standards, the ordinance impermissably delegates basic policy matters to law enforcement officials and invites application in an ad hoc and subjective manner.

SUMMARY OF ARGUMENT

Amicus posits that Ordinance No. 969-1978 of the Village of Hoffman Estates, Illinois is so vague as to violate the due process clause of the Fourteenth Amendment. That is not its sole constitutional defect. It also impermissibly impinges upon fundamental freedoms guaranteed by the First Amendment of the Constitution of the United States. This infringement occurs through the ordinance's use of the proximity of literature which encourages the illegal use of drugs or cannabis as one of the factors which triggers application of the ordinance. Where vague legislation touches upon fundamental First Amendment rights, it must withstand stricter scrutiny of its vagueness than statutes which do not so affect First Amendment rights. The use of the proximity of constitutionally protected literature to trigger the application of the ordinance will necessarily result in a chilling affect on merchants' exercise of their First Amendment freedoms. If literature, which is in and of itself constitutionally protected, may be deemed by some to encourage the illegal use of drugs, thereby requiring the seller of such literature to obtain a license in order to sell other items in the store, content-based censorship motivated by self-preservation will result. Failure to so censor one's salable literature may result in prosecution for selling items deemed covered under the ordinance due to their proximity to constitutionally protected literature.

Further, where legislation involves fundamental freedoms, such as those guaranteed by the First Amendment, the legislation must withstand stricter constitutional scrutiny under the

standards embodied in the First and Fourteenth Amendments to the Constitution of the United States. Where legislation affects First Amendment freedoms, the legislation must be the least restrictive alternative available to the government to achieve the desired goal. It is insufficient for the legislation merely to be rationally related to a legitimate state purpose. Indeed, legislation affecting fundamental freedoms must be necessary to accomplish a compelling state purpose. The Hoffman Estates Ordinance fails to satisfy either requirement. It seeks to accomplish what cannot be termed a compelling state purpose. Further, it is not necessary to link the ordinance to First Amendment rights to accomplish even the purported governmental goal sought to be achieved by the Hoffman Estates Ordinance.

The municipal ordinance at bar contains no scienter element. No language in the ordinance purports to incorporate a "willfull", "knowing" or "intentional" *mens rea* standard. Rather, application of the ordinance is dependent upon the physical characteristics of certain items such as "roach clips" or cigarette papers. The ordinance is also triggered by displaying other items in proximity to: (1) items covered due to their physical characteristics; or (2) constitutionally protected literature declared to "encourage" the illegal use of drugs. Scienter cannot merely be declared to be a proper element of this ordinance.

Regardless of whether a scienter standard is read into the ordinance at issue, it fails to satisfy the standards of permissible vagueness detailed in *Grayned* v. *City of Rockford,* 408 U.S. 102, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The ordinance of Hoffman Estates does not, on its face, require that a merchant have any specific intent to violate the ordinance before a prosecution for failing to obtain a license for selling items regulated thereunder may be instituted. Even if, however, a scienter standard is imposed on the ordinance, it does not cure the vagueness inherent in this legislation. Where the specific act(s) which is prohibited by the legislation is uncertain, imposition of a scienter

element into the law may cure such vagueness only where the legislation gives, to the ordinary citizen, notice of the circumstances in which the requisite evil intent will be inferred. In the absence of knowable circumstances from which evil intent may be inferred, addition of a scienter element into a prosecution does nothing to more clearly define the act(s) which is prohibited by the law.

The ordinance of Hoffman Estates, and its accompanying guidelines, do not provide notice to merchants of the circumstances from which their intent to sell items designed or marketed for use with illegal cannabis or drugs may be inferred. The license guidelines provided by the Village are in and of themselves so vague as to be useless in foreseeing the circumstances in which one may be deemed to have had the necessary intent. The Model Drug Paraphernalia Act proposed by the Drug Enforcement Agency is radically different from the ordinance at bar. It appears to attempt, however, to include more specific factors which are to be considered in determining the status of an object and accordingly sets out fourteen specific factors which are to be considered by a court in determining whether an item is drug paraphernalia. These factors, assuming an element of scienter in the Model Act, also fail to provide any reasonable warning of the circumstances in which one will be inferred to have had intent to sell drug paraphernalia. The Model Act defines no more clearly than does the ordinance of Hoffman Estates the act(s) which is to be covered or prohibited.

Finally, regardless of the element of scienter, the chilling effect of such an ordinance on the exercise of First Amendment rights by merchants is still present. When a merchant is confronted with a borderline situation, the honest resolution of a doubt in his own favor may be deemed to connote the requisite evil intent. Where this is a possibility, the effect of such legislation will be to force merchants to act as censors of the publications which they sell and steer far wider of the lawful zone than if the boundaries of the forbidden area had been clearly marked.

ARGUMENT

I. The Municipal Ordinance Of Hoffman Estates Is Unconstitutionally Vague Due To Its Chilling Effect On The Exercise Of Rights Guaranteed By The First Amendment Of The Constitution Of The United States.

Unquestionably, the ordinance at issue constitutes state action for purposes of analysis under the Fourteenth Amendment of the Constitution of the United States. *Carlson* v. *People of State of California,* 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1108 (1940). Further, as the Appellant's brief admits, the fact that the ordinance purports to be regulatory rather than penal does not absolve it from adherence to the constitutional principles which are offended by vague laws. As the Court of Appeals below found, the fundamental defect in vague legislation is not the existence of a penalty; rather, it is "the exaction of obedience to a rule of standard . . . so vague as to be no rule or standard at all." *A. B. Small Company* v. *American Sugar Refining Company,* 267 U.S. 233 at 239, 45 S.Ct. 295, 69 L.Ed. 589 (1925).

The Constitutional principles which are offended by vague laws are at least three in number. In what has become the definitive language in this field, the Court in *Grayned* v. *City of Rockford,* 408 U.S. 102 at 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) declared:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant

> dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked." (Citations omitted.)

It is the third constitutional value offended by vague laws, the inhibiting effect on the exercise of citizens' First Amendment rights, that is the primary thrust of this analysis. It is submitted that ill-defined legislation which touches upon First Amendment rights creates two separate constitutional problems under the Fourteenth Amendment alone. First, such legislation 'aggravates the vice of vagueness' by attaching possible duties, obligations, or penalties to otherwise protected expressions of speech. *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961). Secondly, by impacting upon rights protected under the First Amendment, stricter standards of analysis must be applied to the legislation, not only in determining the extent of permissible vagueness but also in examining the connection between the end sought to be achieved and the means chosen to accomplish that purpose. When legislation affects First Amendment rights, it is only the least restrictive alternative that is acceptable. *Shelton* v. *Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

Hoffman Estates' ordinance No. 969-1978, in short, makes it unlawful for any person to sell any item which is designed or marketed for use with illegal cannabis or drugs without being licensed to do so. Additionally, once licensed the merchant must keep a police log in which must be kept the name and address of purchasers of items sought to be regulated, along with the name and quantity of the item purchased and the date and time of such purchase. This record must be signed by the agent of the merchant making the sale and must be kept, open to the police, for a period of two years after the date of the sale.

While the ordinance purports to require registration of only specific items which are designed or marketed for use with illegal drugs the only safe course, for any merchant, is to register all purchases from the store. Indeed, as noted in Footnote 1 of the opinion of the Circuit Court below (639 F.2d at 375), the Appellee was advised by counsel for the Appellant that all items sold should be noted on the police register. Given the standard definition of the word 'paraphernalia' — articles of equipment — no other course of action is possible. This definition, parenthetically, is the one adopted by the District Court below in its construction of this ordinance.

In an attempt to ameliorate the obvious constitutional deficiencies in the ordinance, the village passed certain license guidelines intended to be read in conjunction with the ordinance. The guidelines are set out in the footnote below.[1] The license guidelines promulgated by the Appellant make clear that an important factor in determining whether a merchant's marketing scheme is such that it triggers application of the ordinance is the proximity of an item, such as a pipe, to literature which encourages the illegal use of cannabis or drugs.

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[1] LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA ACCESSORY, OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

The ordinance is not one which regulates an article about which there is no uncertainty of definition, such as milk or flowers. Rather, it regulates, "drug paraphernalia" an item which is not really an item at all. It is actually a concept, and an amorphous one at best. For, as so many of the courts which have considered drug paraphernalia legislation have noted, what constitutes drug paraphernalia is limited only by the ingenuity of the drug user. Because of the unlimited number and nature of the items which can be drug-related paraphernalia the external standards which may trigger application of the ordinance become ever more important. Indeed, Appellee was forced to remove 72 items from its shelves in an attempt to eliminate the possibility of prosecution under the ordinance. While the District Court viewed this action as indicating that the definition of drug paraphernalia was clear, the contrary is true. By removing all items of questionable status, it is not clear how many items which would not have been regulated under the ordinance, if enforced, may have been removed. Even this action, however, does not eliminate the possibility that Appellee has not fully complied with this ordinance. The extremely broad scope of the ordinance, through its link to constitutionally protected literature, would require the Appellee or any other merchant to obtain a license if literature which encourages the use of illegal drugs is sold in a store which sells any other objects. Without clear and precise standards concerning the covered items, to use a phrase from *Grayned,* one is forced to "steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked."

The vagueness inherent in an ordinance which regulates a concept, rather than an article, is compounded by the fact that one of the triggering factors of this ordinance is the proximity of an item to constitutionally protected literature which "encourages" the use of illegal drugs. The nebulous nature of this triggering standard, through its use of language such as "proximity" and "encourages", is apparent. Does the literature need to advocate the use of drugs by all, or is it sufficient that it discusses the ef-

fects of drugs on the mind or body? Given the psychology of youth, literature which condemns drug use as harmful or immoral may be as enticing to those viewing it as would be literature which glorifies drug use. Certainly, literature which seeks to have the laws governing the use of certain drugs changed, such as pamphlets or ads put out by the National Organization for Reform of Marijuana Laws (NORML) could be thought by some to encourage the use of drugs. If the existence of such literature in proximity (however that may be defined) to a salable item triggers the application of the ordinance, then any sale in the proximity of almost any literature may result in prosecution for failing to obtain the license necessary to sell the item. Again, as the Circuit Court noted below:

> It appears that displaying almost any item in the proximity of "literature encouraging illegal use of . . . drugs" requires the store to obtain a license and have purchasers sign the register. This means that paper clips sold next to *Rolling Stone* magazine conceivably could trigger the requirements of the ordinance. Perhaps the village would not construe the ordinance in this manner. But the point is that there is no way for a seller to determine which particular item or arrangement of merchandise will require a license. 639 F.2d at 382

As the Court declared in *Baggett* v. *Bullitt*, 377 U.S. 360 at 373, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964): "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of vagueness."

With ambiguity such as this abounding throughout this ordinance, a merchant is effectively required to choose between the exercise of his First Amendment right to sell or display constitutionally protected literature; his right to espouse beliefs which are different from the majority's; or his right to seek the change of laws with which he disagrees and the possible destruction of his business. For as again noted by the Court of Appeals

below, this ordinance, while formally recognizing the right of merchants to sell the items sought to be regulated, is actually an attempt to do covertly what is forbidden to it overtly. Indeed, the parties stipulated below that the primary purpose of requiring a police register is to discourage the purchase of the items sought to be regulated. 639 F.2d at 385, Footnote 29.

When the vagueness inherent in an ordinance which attempts to regulate a concept, rather than a specific article, is combined with the vague standards which trigger the ordinance, (literature which *encourages* the use of illegal drugs when displayed in *proximity* to pipes or paraphernalia — articles of equipment) it is apparent that there is vagueness upon vagueness. When that vagueness abuts fundamental First Amendment rights, as here, the third constitutional value endangered by vague laws is in true peril. A merchant should not be forced to act as a censor of literature merely because he sells merchandise other than literature. When faced with choosing between property and liberty, both of which are protected by the due process clause of the Fourteenth Amendment, there is no choice that is acceptable. This problem is intensified when the ordinance does not make clear what choice the ordinance considers a merchant to have made by a given act. The Hoffman Estates ordinance does indeed exact obedience to a standard which is no standard. There is simply no way to tell when one may be endangering his business or facing prosecution under this ordinance by selling or possessing constitutionally protected literature.

Beyond the ordinance's "aggravation of the vice of vagueness" its link between First Amendment rights and the ordinance's coverage exposes another constitutional infirmity under the due process clause of the Fourteenth Amendment. As noted earlier, where legislation infringes on fundamental First Amendment rights, it must be more carefully scrutinized by the courts. That it is rationally related to a legitimate governmental purpose is no longer sufficient to justify the law. It must be the least restrictive alternative available to the government.

"Stricter standards of permissible vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U.S. 147 at 151, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 at 287, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961).

Nor does the attempt to impose a scienter standard on the ordinance alleviate the problem. *Cramp* v. *Board of Public Instruction, Id.* It is meaningless to hold that the law must be violated knowingly when the law is so vague as to be unknowable and dangerous to so hold when fundamental freedoms are affected.

Even assuming, then, a legitimate governmental purpose behind this ordinance, (although this assumption is rebutted by the stipulation of the parties noted above — attempting to discourage the purchase of legitimate items of which those in power do not approve can hardly be termed a legitimate state purpose) regulation in a manner which has as one of its unavoidable consequences a chilling effect on the exercise of First Amendment rights is impermissible. For, as the court noted in *Shelton* v. *Tucker,* 364 U.S. 479 at 488, 81 S.Ct. 247 at 252, 5 L.Ed.2d 231 (1960), "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Requiring merchants who sell or display literature which discusses or relates to drug use to do so only while either branding themselves as merchants who deal in items for use with illegal drugs or facing possible prosecution for not so branding themselves can hardly be termed the least restrictive alternative available to the government. The decision to sell or display constitutionally protected literature which concerns or discusses drugs, or to exercise one's right to seek the change of laws which

one feels — for whatever purpose — should be changed, is not a decision that is to be made under the cloud of prosecution or the possible destruction of one's business. Fear of such destruction is well founded. Mere inconvenience to customers, if not the fear of heightened police scrutiny, would be sufficient to achieve the purpose of the Village of Hoffman Estates, as that purpose is noted in the stipulation of the parties cited above.

"The power to regulate must be so exercised as not, in attaining a permissible end, unduly to abridge the protected freedom". *Cantwell* v. *Connecticut,* 310 U.S. 296 at 304, 60 S.Ct. 900 at 903, 84 L.Ed. 1213 (1940).

As recognized by the Supreme Court of California in *People* v. *Fogelson,* 145 Cal.Rptr. 542, 577 P.2d 677 (1978) the fact that the ordinance does not on its face purport to regulate First Amendment activities does not absolve it of its constitutional obligations for affecting those rights. That the Hoffman Estates ordinance does not purport to regulate literature itself does not change its chilling impact on those who deal in, or publicize because of their own beliefs, such literature.

The net effect of the linkage between the ordinance with its concomitant penalties for violation and the First Amendment rights of merchants to display constitutionally protected literature is similar to the loyalty oaths at issue in the case of *Baggett* v. *Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). In discussing the oaths at issue, the Court in *Baggett* stated that "the uncertain meanings of the oaths require the oath-taker — teachers and public servants — to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden zone were clearly marked." (Citations omitted), 377 U.S. at 372.

Similarly, tying the necessity of a license and the keeping of a police register to the exercise of one's fundamental First Amendment rights results in the same problem. Merchants will steer far wider of the boundaries within which constitutionally protected literature would trigger the application of the ordinance than if its coverage were clearly defined.

It is this chilling effect that mandates, when dealing with legislation affecting First Amendment rights, that only the least restrictive alternative be used. In the instant case, there is no need at all for a regulation to be tied to the publications which one possesses, either for sale, display or personal statement. To exact so heavy a price for the exercise of First Amendment freedoms is prohibited by the due process clause of the Fourteenth Amendment.

Further, it is likely that the ordinance's link between licensing, with its accompanying penalities, and the fundamental rights of free speech and press renders the ordinance invalid under the First Amendment itself.

The ordinance impermissibly regulates, although indirectly, the content of literature sold in the village. Government action aimed at suppressing the content of a communication is presumptively violative of the First Amendment. *Police Dept. of City of Chicago* v. *Mosely,* 408 U.S. 92, 95 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The ordinance imposes a substantial burden on protected First Amendment freedoms. By requiring a license in order to sell literature along with other merchandise, the ordinance is effectively a prior restraint on the dissemination of the ideas embodied in literature. Further, the ordinance unquestionably penalizes protected symbolic speech. *Tinker* v. *Des Moines Community School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). The ordinance also impermissibly penalizes protected commercial speech as the method of display and marketing chosen by a merchant is a commercial message to potential customers just as is a television commercial or newspaper advertisement. Thus, should the Court find this ordinance valid under the Fourteenth Amendment, it is submitted that the case should be returned to the Circuit Court for examination of the other constitutional infirmities alleged by the Appellee at trial.

II. Imposition Of A Scienter Requirement On The Ordinance Does Not Cure Its Vagueness.

Appellant argues in its brief, at page 21, that scienter is a necessary element in the Hoffman Estates Ordinance. Consequently, Hoffman Estates maintains that Ordinance No. 969-1978 is not impermissibly vague, as the village would have the burden of proving, in any action based upon violation of the ordinance, that the merchant sold items intending them to be designed or marketed for use with illegal drugs without obtaining a license therefor. Examination of the total ordinance, in connection with the license guidelines, belies such a position.

The license guidelines make clear that the coverage of the ordinance is dependent upon external factors beyond control of a merchant. Items "designed" for use with illegal drugs are discovered, under the license guidelines, by examining their physical characteristics. Cigarette papers, for example, are covered unless they are white papers or tobacco-oriented papers not necessarily designed for use with illegal cannabis.

The Court below saw the vagueness inherent in this definition, however, for purposes of this argument it is sufficient to note that coverage is based not on the intent or design of the merchant but rather upon the physical characteristics of the papers themselves.

Coverage based on whether an item is marketed for use with illegal drugs appears to connote more of an individualized intent requirement. Close analysis of the license guidelines indicates, though, that whether an item, for example a pipe, is covered is based upon whether it is displayed within proximity of items whose status under the ordinance is based solely on design, such as non-white cigarette papers or "roach clips". The ordinance may also be triggered by displaying a pipe within proximity to literature deemed to encourage the use of illegal drugs. Thus, in the absence of other items covered solely on their physical

characteristics an item such as a pipe would not be covered. With the ambiguous definition given items deemed to be drug paraphernalia *per se*, such as roach clips, the use of the marketing scheme as a trigger for the ordinance is circular. As the testimony cited in Footnotes 17 and 18 of the opinion below indicate (639 F.2d at 381), there are no design characteristics of a "roach clip" which are different from those of an alligator clip. Hoffman Estates would determine, then, whether a certain clip is covered based on the merchant's marketing concept. But a determination of whether a given marketing concept is one which orients the products towards use with illegal drugs is based upon whether an item is displayed next to items considered drug related *per se* because of design characteristics. When a merchant is finished chasing his tail in an attempt to determine if his marketing scheme requires a license, the final arbiter is either (1) the nearness of objects covered based on their design characteristics; or (2) the proximity of constitutionally protected literature. It is therefore submitted that no scienter standard can properly be read into the ordinance at issue. The specific intent of a merchant is irrelevant in determining whether this ordinance requires the merchant to obtain a license or face penalties for failing to do so.

Even assuming, however, that a scienter element is found in this ordinance, scienter does not save the ordinance. For, as Justices Roberts, Frankfurter, and Jackson, in their dissent from the plurality opinion in *Screws* v. *U.S.*, 325 U.S. 91, at 153, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) eloquently stated:

> When a criminal statute prohibits something from being 'willfully' done, 'willfully' never defines the physical conduct or the result the bringing of which to pass is proscribed. 'Willfully' merely adds a certain state of mind as a prerequisite to criminal responsibility for the otherwise proscribed act. If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment, so that men

> may presumably have an opportunity to avoid the happening . . ., then 'willfully' bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable. 'Willfully' doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done 'willfully'.

In detailing the logical steps taken to arrive at this conclusion, reference may be made to cases arising out of legislation based on the Model Drug Paraphernalia Act supported by Amici Arkansas, *et. al.* By and large, however, the issues raised and concerns voiced in the brief Amicus Curiae of Arkansas, *et. al.*, are irrelevant to a determination of the issues raised in the instant case.

In the drug paraphernalia context, the phrase "designed for use" does create an impermissible vagary. For, as Judge Conaboy found in the *Lazy J. Ltd.* v. *Borough of State College*, No. 80-1167, slip. op. at pp. 4-6 (M.D. Pa. January 30, 1981), the phrase creates two classes of vagueness. The first is an interpretational vagueness — does the act allow for prosecution based on transferred intent? The second is a definitional vagueness — what acts are prohibited, or items are covered, under that phrase?

Imposition of a scienter standard may cure the first vagueness. It can be held to eliminate the possibility of prosecution based on the intent of someone other than the person charged with the violation. The Court in *Lazy J. Ltd.* found, however, that a clear reading of "designed for use" failed to do even that. More importantly for immediate purposes, however, the court found that scienter had no impact upon definitional vagueness — in the instant case, what items are covered. Quoting from the opinion of the three judge panel in *Indiana Ch., NORML* v. *Sendak*, No. Th 75-142-C (S.D. Ind. Feb. 4, 1980), the Court held:

> ...[T]he term 'designed' could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition 'designed for drug use' gives no hint to those attempting to comply with [the ordinance] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.' *Id.*, slip op. at 13. (Also adopted in *Record Revolution No. 6* v. *City of Parma*, 638 F.2d 916 (6th Cir. 1980) vacated and remanded, 49 U.S.L.W. 3882, May 26, 1981)

Imposition of a scienter element cannot cure this definitional vagueness in the instant case. Considered under *Grayned*, a law is impermissibly vague if it: (1) fails to place a person of ordinary intelligence on notice as to the prohibited conduct; (2) fails to provide enforcement standards; (3) chills First Amendment rights, if First Amendment rights are involved.

Scienter may cure interpretational vagueness — that is, what standards of enforcement will be applied. The question of whether scienter can cure definitional vagueness — what is prohibited — is more complex. In this context scienter defines the state of mind that will make an ordinary act a prohibited one.

To accomplish this purpose, however, the specific intent standard must do more than add specific intent as an element of the crime. As intent is usually proven by circumstantial evidence, the specific intent requirement combined with the prohibited act must give a person of ordinary intelligence fair warning of the circumstances in which intent will be inferred. Without such circumstances, the addition of a scienter element to an ordinary act (be it making a telephone call or selling a pipe) is meaningless because of the impossibility of classifying the act as one which is prohibited.

Where the act involved is a common legitimate act, the specified intent must provide notice of the circumstances from which the evil intent may be inferred in order to provide notice of the prohibited act. Consider *Music Stop, Inc.* v. *City of Ferndale,* 488 F.Supp. 390 (E.D.Mich. 1980). In *Ferndale,* the city council passed an ordinance making it unlawful to sell or in any way furnish any instrument primarily designed or adapted for use with a controlled substance. Among the specifically defined terms in the ordinance was the definition of a marijuana or hashish pipe, that being a "pipe characterized by a bowl so small that the primary use for which it is reasonably adapted or designed is the smoking of marijuana or hashish." (488 F.Supp. at 391)

The Court found this definition, among other, impermissibly vague as there are no ascertainable standards which would allow a merchant to infer that a particular pipe has a bowl "so small" as to be primarily designed or adapted for use with marijuana or hashish. The Court considered and rejected the claim that the standards of *McGowan* v. *Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1960), allowed the city to place the burden of defining the prohibited acts on the merchant. Accord, *Magnani* v. *City of Ames, Iowa,* 493 F.Supp. 1003 (S.D.Iowa 1980).

Screws v. *U.S.,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, does not hold otherwise. *Screws* involved construction of § 20 of the U.S. Criminal Code (18 U.S.C. § 52), which made criminal the willful deprivation of a constitutional right. (325 U.S. at 103) In determining whether the statute was unconstitutionally vague due to the shifting nature of constitutional rights as defined by the courts, Justice Douglas, writing for the plurality, stated that it is only where the constitutional right has been specifically defined, either by the courts or the Constitution, that a violation could be found.

The plurality held only that where an intent to deprive a person of a specific (defined) constitutional right is present, an ac-

cused may not sufficiently protest that he had no prior notice that he was committing a criminal act. In fact, at 325 U.S. 105, the plurality opinion states:

> Of course, willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment.

Thus, for scienter to cure definitional vagueness, the specific intent requirement and the act or conduct defined in the statute must together provide notice to ordinary citizens of the *prohibited* conduct. When the defined conduct — the *actus reus* — is generally legitimate, as for example the sale of a pipe, the *mens rea* required must clearly indicate the circumstances from which the intent which makes the act prohibited will be inferred. Otherwise, the citizen remains unable to tell whether his act is legal or illegal.

In focusing on the ordinance's failure to warn citizens of the conduct regulated, it would be easy to neglect the problems which this uncertain definition creates under the second prong of *Grayned*. The vague definition of the regulated act, even assuming the presence of the element of scienter which, as noted earlier, is not present in this ordinance, leaves policemen, prosecutors, judges and juries free to speculate on the standards by which one charged with a violation of the ordinance is to be judged.

In discussing the problem of the lack of enforcement standards, the three judge panel in *Indiana Ch., NORML* v. *Sendak*, No. Th-75-142-C, slip. op. at 16 (S.D.Ind. Feb. 4, 1980) stated:

> The main and often only circumstances will be possession of a device deemed on an ad hoc basis to be paraphernalia. Given the inability of the statute to specify what is or is not paraphernalia and given the bootstrapping nature of the in-

> tent requirement, there is a clear danger that people who did not intend to violate I.C. 35-48-4-8 and did not think they were in violation of the law will nevertheless be deemed to be in possession of paraphernalia.

While the above quotation concerns a drug paraphernalia act radically different from the one at bar, the lack of enforcement standards is an apparent similarity. When the items to be covered are inherently multi-use items, failure to set out standards for enforcement clearly delegates basic policy matters to law enforcement officials.

The Village of Hoffman Estates has recognized the necessity of standards to guide those charged with enforcing the ordinance. It has attempted to alleviate this problem by passage of the license guidelines previously referred to. As will be seen, however, the guidelines do not cure the problems of the ordinance.

As noted initially, the Hoffman Estates ordinance does not appear to have any scienter requirement. If, however, scienter is read into the ordinance, it still fails to provide notice of the regulated conduct.

Section 1(A) of the ordinance effectively prohibits the sale of anything by anyone without a proper license (the *actus reus*) where the object sold is designed or marketed (intended) for use with illegal drugs (the *mens rea*).

The act prohibited — the sale of anything — provides no reasonable notice of what specific conduct is prohibited. Thus, to satisfy *Grayned*, the intent standard must provide in its entirety the notice of the prohibited conduct. As earlier indicated, this can be done only where the specific intent standard provides notice of the circumstances from which it can reasonably be foreseen that the intent requisite to create the forbidden act will be inferred.

The license guidelines attempt to specify when the ordinance will apply and thus provide the only standards in the ordinance from which a merchant may foresee the circumstances in which the requisite intent will be inferred. These guidelines are themselves, however, so vague as to provide no notice at all.

The first guideline involves the sale of cigarette papers. They are covered under the ordinance unless they are white papers or tobacco-oriented papers not necessarily designed for use with illegal drugs. Obviously, all cigarette papers may contain any material which may be smoked. How is a merchant to tell what are tobacco-oriented cigarette papers? Are brown or beige papers acceptable or must they have "Bull Durham" stamped on the package? Further, if design does not refer to objective physical characteristics then white or tobacco-oriented papers may be "designed" for use with illegal drugs just as colorful cigarette papers may. When is a cigarette paper not *necessarily* designed for use with illegal drugs? The only thing that this guideline tells a merchant is that unless he sells only solid white cigarette papers, with no colorful design on the package, his actions *may* require a license. Certainly, these guidelines give no help in determining what conduct of the merchant's is covered or what circumstances will allow the government to infer the requisite bad intent, and thereby trigger the application of the ordinance.

Secondly, "roach clips" are items deemed designed for use with drugs and therefore covered. What, however, is a "roach clip"? Testimony noted in Footnotes 17 and 18 of the Circuit Court opinion below (639 F.2d at 381) shows that there are no design differences between an alligator clip and a "roach clip". Hoffman Estates would, therefore, decide whether a given clip is covered based on a merchant's marketing scheme. If, however, the merchant's intent as evidenced circumstantially by his marketing scheme is to provide him notice of the prohibited conduct, the ordinance must specify what marketing scheme will allow that inference. The second guideline is of no help in deter-

mining those circumstances, however, as they do not tell him what marketing scheme will imply that he is selling "roach clips". Rather, they tell him only that if he sells clips at all such a sale is evidence of his marketing scheme. The circular reasoning of the ordinance gives no warning, then, as to its scope of coverage under this standard.

Thirdly, pipes are not covered under the ordinance unless they are sold within proximity of: (1) non-white or tobacco-oriented paper (which is itself unregulated by the ordinance); (2) roach clips; or (3) literature which encourages the use of illegal drugs. At first blush, this guideline appears to give the merchant more objective determinants of the circumstances from which his intent will be inferred, therefore defining the covered or prohibited conduct more specifically. Closer analysis, however, shows that it fails to provide any objective criteria of measurement. What is within "proximity"? *Webster's Third New International Dictionary* 1828 (1976) defines "proximity" as the state of being proximate, which in turn is defined as very near or close. *Black's Law Dictionary* 1391 (4th ed. 1968) defines "proximate" as immediate; nearest; direct; or next in order. May a merchant stock pipes and non-white cigarette papers if they are not directly next to one another in the store? Similarly, assuming one knows what a "roach clip" is, as opposed to any other clip, how close may they be to other objects before there is a inference of intent and the ordinance is triggered. Additionally, as noted in Proposition I above, how does one define literature that "encourages" the use of drugs; must it advocate drug use or is it sufficient that it merely states that certain drugs have not been shown to have addictive effects. Is one magazine article sufficient literature to trigger the ordinance or must it be a series of articles or a number of books. A person of ordinary intelligence remains unable to determine what circumstances will imply an intent that the items sold be used with illegal drugs. Due process demands more than a guessing game as to the prohibited conduct.

The final guideline does no better. It provides that a merchant may infer that "paraphernalia" is designed or marketed for use with illegal drugs if it is displayed near roach clips or literature which encourages the illegal use of drugs. The same problems confront this guideline as did the others above and repetition of these problems would serve no purpose. Suffice it to say that they provide no guidance to the merchant as to what conduct of his will imply the necessary intent and thereby trigger the ordinance. As is said in Las Vegas, "Round and round she goes and where she stops nobody knows". Due process requires more than forcing a citizen to "pay his money and take his chances", gambling on whether his conduct is prohibited, especially where there are sanctions for failing to properly guess the answer.

Appellant suggests, that, given more time, it, through its Administrative procedures Act, would have adopted more sufficient guidelines. Appellant speculates that they would have been akin to the criteria listed in the Model Act proposed by the DEA and supported by Amici Arkansas, *et al.*

Amicus avers that full and comprehensive analysis of the entire Model Act will show that it suffers from many of the same constitutional defects that exist in the ordinance at bar. The Model Act is contained in the appendix of the brief Amicus Curiae of Arkansas, et. al. To attempt, however, to discuss the constitutional status of an act not before the Court is to obscure the Court's view of both the Model Act and the Hoffman Estates Ordinance. Suffice it to say that the criteria listed in the Model Act which a court or other authority shall consider in determining whether a particular item is drug paraphernalia have peculiar constitutional problems of their own.

Because of the individual modifications of the Model Act made by the various states and localities which have adopted the Model Act, only a general analysis of the Act as proposed would be possible. Such a general discussion would, however, be largely irrelevant to the specific issues at bar. Accordingly, Amicus will

only point out to the Court that the courts below are split on the constitutionality of the various adaptations of the Act which have been judicially scrutinized. Many of these courts have specifically found the list of criteria contained in the Act which are to be considered in determining the status of an object to be either unconstitutional or so ethereal as to provide no benefit to either law enforcement officials or ordinary citizens. *See, General Stores, Inc.* v. *City of Albuquerque,* No. 81-0027-M, slip. op. at p. 6 (D.N.M. March 24, 1981); *Lazy J. Ltd.* v. *The Borough of State College,* No. 80-1167, slip. op. at p. 8-9 (M.D.Pa. Jan. 30, 1981); *The Town Tobacconist, et al.* v. *Degnan* (Superior Court., N.J., March 12, 1981); *Weiler* v. *Carpenter,* No. 80-637-JB. slip. op. at p. 23 (D.N.M. Feb. 11, 1981)

Indeed, as the Court in *Lazy J. Ltd., supra,* stated:

> The difficulty with these standards is that they do not take discretion away from police, magistrates and judges who are to administer the act. In fact, they simply add to the subjective nature of the decision to enforce the statute. They give full leeway to the enforcing officer to determine what statements indicate an intent to use an object with drugs, what manner of advertising and what manner of displaying connote the requisite intent.

While cases holding to the contrary exist, it is sufficient to note that adoption of the Model Act criteria would not inherently have remedied the defects in the ordinance at issue. Further discussion of the factors involved in legislation based on the Model Act must, however, await the proper forum.

Finally, it must not be forgotten that the Hoffman Estates ordinance is linked to the exercise of fundamental First Amendment rights. Where legislation abuts First Amendment freedoms, the imposition of a scienter standard does nothing to eliminate the problem caused by vague laws in the First Amendment context. The harm in the First Amendment context,

whether scienter is present or not, is that citizens will be forced to steer wider of the unlawful zone than if the boundaries were clearly marked. Given the fundamental nature of the First Amendment freedoms, it is this chilling effect that is a constitutional harm in and of itself. In *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961) the Court dealt with a Florida loyalty oath into which the element of scienter had been read by the Supreme Court of Florida. Speaking for a unanimous Court, Justice Stewart adopted the language found in *Smith* v. *California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), which stated: "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril, because the free dissimination of ideas may be the loser."

The only safe approach for a merchant to take in the Village of Hoffman Estates is to avoid stocking or displaying any literature which might be deemed to encourage the illegal use of drugs. The impact of this act of self-preservation is indicated in 26 Minn.L.Rev. 661 (1942):

> It is clear that more must be shown to convict a man where intent must be proved than where it is not required. Yet it is equally clear that where the overt act which constitutes the crime is insufficiently defined, a stipulation that the act must be done intentionally before it is unlawful is of no aid in determining what acts are in fact within the definition. Furthermore, when the person affected is confronted with the borderline situation in which he has honest doubts as to the proper action, a resolution of the doubt in his own favor is often indistinguishable from a willful evasion. Consequently, the vagueness of the definition compels men to lean over backward in many circumstances in order to avoid imputations of the intent or bad faith specified in the statute.

In the context of First Amendment freedoms, such bending over backward to avoid the imputation of bad intent is the very chilling effect which this Court has found, as a basic policy matter, is unacceptable.

In summary, then, the Hoffman Estates ordinances fails to provide reasonable notice to men of ordinary intelligence of the acts which it seeks to regulate. Even assuming that scienter is a necessary element of a prosecution for violation of this ordinance, the ordinance and its guidelines fail to specify the circumstances in which specific intent necessary to violate the law may be inferred. Barring delineation of those circumstances, the addition of an element of scienter to the prosecution for violation of the ordinance does nothing to specify what acts are purportedly covered or prohibited in the absence of a license. The true purpose behind the Hoffman Estates ordinance, that being to discourage the purchase of items such as the ones sought to be regulated, is most effectively accomplished by the passage of a vague and ill-defined ordinance such as the one at issue. While the ordinance may serve such a purpose, it fails to satisfy the necessary requirements of due process of the law as required by the Constitution of the United States.

CONCLUSION

For all of the above reasons, Amicus respectively submits that this Court should affirm the judgment of the Court of Appeals for the Seventh Circuit below in all respects. Alternatively, should the Court find the ordinance not impermissibly vague, the case should be remanded to the Court of Appeals for consideration of other constitutional defects alleged below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, ET AL.,
Appellants,

v.

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
AN ILLINOIS CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, INDIANA, KANSAS, LOUISIANA, MAINE, MARYLAND, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, TEXAS, UTAH, and WASHINGTON as AMICI CURIAE

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TABLE OF CONTENTS

PAGE

INTERESTS OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT:

THE LANGUAGE "USED, INTENDED FOR USE, OR DESIGNED FOR USE" IN THE DEFINITION OF PROHIBITED DRUG PARAPHERNALIA IS NOT PER SE VAGUE AND IS CONSTITUTIONAL AS EXEMPLIFIED BY THE DECISIONS CONSTRUING THE MODEL DRUG PARAPHERNALIA ACT 3

CONCLUSION 13

APPENDIX A — Model Drug Paraphernalia Act (U.S. Dept. of Justice, August, 1979) 1a

APPENDIX B — Federal statutes containing the terms "designed for use" and/or "intended for use" 17a

TABLE OF CITATIONS

Cases

Boyce Motor Lines v. United States, 342 U.S. 337 (1952) 11

Brache v. County of Westchester, 507 F. Supp. 566 (S.D.N.Y. 1981) 10

Chapman v. United States, 271 F.2d 593 (5th Cir. 1959) 11

Delaware Accessories Trade Ass'n v. Gebelein, 497 F. Supp. 289 (D. Del. 1980) 10

Flipside, Etc. v. Village of Hoffman Estates, 639 F.2d 373 (7th Cir. 1981) 2, 3, 8, 9

PAGE

Florida Businessmen for Free Enterprise v. City of Hollywood, No. 80-6157-CIV-HCR (S.D. Fla. Aug. 29, 1980) 10

Heijira Corp. v. MacFarlane, No. 80-2062 (10th Cir. May 5, 1981) 10

Israel v. United States, 63 F.2d 345 (3rd Cir. 1933) 11

Jones v. United States, 11 F.2d 98 (4th Cir.) cert. den. 271 U.S. 682 (1926) 11

Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834 (D. Md. 1980) 2, 8, 9

New England Accessories Trade Ass'n, Inc. v. Browne, 502 F. Supp. 1245 (D. Conn. 1980) 10

New England Accessories Trade Ass'n, Inc. v. City of Nashua, Civ. No. 80-530-D (D.N.H. Dec. 8, 1980) 10

Screws v. United States, 325 U.S. 91 (1945) 11

Stroh Products Co. v. Davis, 8 F.2d 773 (E.D. Mich. 1925) 11, 12

The Casbah, Inc. v. Thone, No. 80-2033 (8th Cir. June 8, 1981) 3, 10

Tobacco Accessories and Novelty Craftsmen Merchants Ass'n v. Treen, 501 F. Supp. 168 (E.D. La. 1980) 10

United States v. 2265 One-Gallon Paraffined Tin Cans, 260 F.2d 105 (5th Cir. 1958) 11

United States v. Brunett, 53 F.2d 219 (W.D. Mo. 1931) 3, 11

United States v. Nomel Products Co., 47 F.2d 575 (2d Cir. 1931) 11

United States v. Price, 383 U.S. 787 (1966) 11

Weinstein v. United States, 293 F. 388 (1st Cir. 1923) 11

Statutes and Ordinances	PAGE
26 U.S.C. § 5686 (1976)	3, 11
National Prohibition Act, 41 Stat. 313, Ch. 85 (1919)	11, 12
Village of Hoffman Estates Ordinance No. 969 — 1978	8
Miscellaneous	
Model Drug Paraphernalia Act (U.S. Dept. of Justice, August, 1979)	*passim*

No. 80-1681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, ET AL.,
Appellants,

v.

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
AN ILLINOIS CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, INDIANA, KANSAS, LOUISIANA, MAINE, MARYLAND, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, TEXAS, UTAH, and WASHINGTON as AMICI CURIAE

INTERESTS OF AMICI CURIAE

The interests of amici curiae are as follows:

The recent surge of drug abuse and the increased awareness of the health and economic perils posed by illicit drug use have caused the states and localities to focus on methods to eliminate this evil.

One focus of the effort has been directed toward "drug paraphernalia." However, initial efforts by the states and

localities themselves to draft constitutional laws controlling drug paraphernalia have generally been unsuccessful.

Accordingly, to assist the states and localities in this effort, the Federal Drug Enforcement Administration of the United States Department of Justice drafted and published in August 1979 the Model Drug Paraphernalia Act with prefatory notes and comments. See *Mid-Atlantic Accessories Trade Ass'n v. Maryland*, 500 F. Supp. 834, 841 (D. Md. 1980).

Amici are states which have enacted statutes based on the "Model Drug Paraphernalia Act" ("Model Act"). All are vitally concerned with coping with the concomitant problems of the use of drug paraphernalia by adults and children alike and the manufacture and distribution of drug paraphernalia by a multi-million dollar industry which exists solely to promote and glamorize the illegal use of controlled substances.

Because similar language appears in the ordinance at issue in this case and the Model Act, amici are concerned that a decision by the Court in this case may adversely affect a decision on the constitutionality of the Model Act. More particularly, amici maintain that proper application of constitutional principles dictates that the "designed for use" standard as used in the Model Act definition of drug paraphernalia is not unconstitutionally vague.

SUMMARY OF ARGUMENT

The ordinance at issue in the case before the Court prohibits "any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs." The U.S. Court of Appeals for the Seventh Circuit in *Flipside, Etc. v. Village of Hoffman Estates*, 639 F.2d 373 (7th Cir. 1981), held the phrase "designed for use" in that ordinance to be unconstitu-

tionally vague. However, the "designed for use" standard is contained in many federal and state statutory schemes, including the Model Drug Paraphernalia Act enacted by twenty-one states, and has repeatedly been upheld by other federal courts. *See, e.g., The Casbah, Inc. v. Thone,* No. 80-2033 (8th Cir. June 8, 1981) and the cases cited therein; *United States v. Brunett,* 53 F.2d 219 (W.D. Mo. 1931) (26 U.S.C. § 5686). In each case, the context in which the "designed for use" standard is utilized is determinative of the constitutionality of the statute. In this respect the Model Act clearly provides a stronger framework for the "designed for use" standard than does the *Flipside* ordinance. The "designed for use" language as contained in the *Flipside* ordinance is different from that employed in the Model Drug Paraphenalia Act for the following reasons. The Model Act is structured so that an essential element of proof in each case is a showing of specific intent of the person charged. Furthermore, the Model Act contains guidelines to be used in determining whether an object is drug paraphernalia. *Flipside, Etc. v. Village of Hoffman Estates, supra,* 639 F.2d at 376, 386.

ARGUMENT

THE LANGUAGE "USED, INTENDED FOR USE, OR DESIGNED FOR USE" IN THE DEFINITION OF PROHIBITED DRUG PARAPHERNALIA IS NOT PER SE VAGUE AND IS CONSTITUTIONAL AS EXEMPLIFIED BY THE DECISIONS CONSTRUING THE MODEL DRUG PARAPHERNALIA ACT.

The Model Act has been the basis for many states,[1] as well as localities, in enacting drug paraphernalia

[1] There have been, to the knowledge of amici, at least 21 state legislatures (namely, Arkansas (Ark. Stat. Ann. § 82-2601 (y)), Colorado (Colo. Rev. Stat. §§ 12-22-501, et seq., as amended by 1981 H.B. 1117 to read: "Primarily designed and intended for use"); Connecticut (Conn. Gen. Stat. §§ 19-443, et seq.), Delaware (Del. Code tit. 16, §§ 4701(13), 4769 (a) (5), and 4771-75), Florida (Fla. Stat. §§ 893.145, 893.146, 893.147 and 893.12), Idaho (Idaho Code §§ 37-2701, 37-2034A, 37-2734B, and 37-2744 (a)

legislation.[2] The prefatory note to the Model Act declares, in part:

> "The Uniform Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Laws, has been enacted by all but a handful of states. The Uniform Act does not control the manufacture, advertisement, sale or use of so-called "Drug Paraphernalia." Other state laws aimed at controlling Drug Paraphernalia are often too vaguely worded and too limited in coverage to withstand constitutional attack or to be very effective. As a result, the availability of Drug Paraphernalia has reached epidemic levels. An entire industry has developed which promotes, even glamorizes, the illegal use of drugs by adults and children alike. Sales of Drug Paraphernalia are reported as high as three billion dollars a year. What was a small phenomenon at the time the Uniform Act was drafted has now mushroomed into an industry so well-entrenched that it has its own trade magazines and associations." *Prefatory Note, Model Drug Paraphernalia Act* (U.S. Dept. of Justice, August, 1979).

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(7)), Indiana (Ind. Code § 16-6-8.5-5 and §§ 35-48-4-8.1 to 8.3), Kansas (Kansas 1981 H.B. 220), Louisiana (La. Rev. Stat. §§ 40:1031 to 40:1036), Maine (Me. Rev. Stat. tit. 17A, § 1111-A), Maryland (Md. Ann. Code, Art. 27, §§ 287A and 297), Nebraska (Neb. Rev. Stat. §§ 28-101, 28-431 and 28-439 to 28-444), Nevada (1981 Nev. Stats. Ch. 216), New Jersey (N.J. Stat. Ann. §§ 24:2146 et seq.), New Mexico (1981 N.M. Laws Ch. 31), North Carolina (1981 N.C. Sess. Laws Ch. 500), Oklahoma (Okla. Stat. tit. 63, §§ 2-101 et seq.), Pennsylvania (Pa. Stat. Ann. tit. 35, §§ 780-102(b), 780-113(a) (32-34), 780-113(i), 780-128(a) (I), 780-141.1), Texas (1981 H.B. 733), Utah (Utah Code Ann. §§ 76-10-1229 and 58-37a-1 et seq.), and Washington (Ch. 48 Wash. Laws 1981, codified in Ch. 6950 Rev. Code of Wash.), which have enacted statutes patterned after the Model Act.

[2] The problem of the proliferation of the sale and use of drug paraphernalia and attempts to control it was also the subject of considerable congressional interest. *See*, Drug Paraphernalia, Hearings Before the House Select Committee on Narcotics, Abuse and Control, 96th Cong., 1st Sess. (1979); Drug Paraphernalia, Hearings Before the Senate Judiciary Subcommittee on Criminal Justice, 96th Cong., 1st Sess (1980).

The constitutionality of the Model Act has been before a number of courts. The major contention in each case has been that the Model Act is unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. To date, however, the majority of the lower federal courts have concluded that the Model Act survives these constitutional challenges. The cases holding the Model Act or a modified version of it to be constitutional in its entirety are legion.[3] There are also a number of cases in which the courts have upheld legislation based on the Model Act after severing portions thought to be impermissible,[4] and cases involving

[3] *The Casbah, Inc., v. Thone*, No. 80-2033 (8th Cir. June 8, 1981); *Nova Records, Inc. v. Sendak*, 504 F. Supp. 938 (S.D. Ind. 1980), *appeal docketed*, No. 81-1107 (7th Cir. Jan. 22, 1981); *Tobacco Accessories and Novelty Craftsmen Merchants Ass'n v. Treen*, 501 F. Supp 168 (E.D. La. 1980), *appeal docketed, No. 80-3854 (5th Cir. Oct. 29, 1980); Mid-Atlantic Accessories Trade Ass'n v. Maryland, supra*, 500 F. Supp. 834 (D. Md. 1980), *appeal docketed*, No 80-1796 (4th Cir. Nov. 18, 1980); *Delaware Accessories Trade Ass'n v. Gebelein*, 497 F. Supp. 289 (D. Del. 1980); *World Imports, Inc. v. Woodbridge Township*, 493 F. Supp. 428 (D.N.J. 1980), *appeal docketed*, No. 80-1851 (3rd Cir. June 30, 1980), *appeal dismissed*, (3rd Cir. Sept. 17, 1980); *New England Accessories Trade Ass'n, Inc. v. City of Nashua*, Civ. No. 80-530-D (D.N.H. Dec. 8, 1980), *appeal docketed*, No. 80-1822 (st Cir. April 14, 1981); *Florida Businessmen for Free Enterprise v. City of Hollywood*, No. 80-6157-CIV-HCR (S.D. Fla. Aug. 29, 1980), *appeal docketed*, No. 80-5769 (5th Cir. Sept. 25, 1980); *Levas v. Village of Antioch*, No. 80-C-1574 (D.N. Ill. April 22, 1980), *appeal docketed*, No. 80-1675 (7th Cir. May 14, 1980) (definition of drug paraphernalia based on Model Act); *The General Stores, Inc. v. Jeff Bingaman*, No. Civil 81-0330 (D.N.M. June 12, 1981), *appeal docketed*, No. 81-1681 (10th Cir. June 23, 1981).

[4] *Heijira Corp. v. MacFarlane*, No, 80-2062 (10th Cir. May 5, 1981) (several the word "adapted" from the phrase "primarily adapted, designed and intended"); *New England Accessories Trade Ass'n v. Browne*, 502 F. Supp. 1245 (D. Conn. 1980) ("reasonably should know" standard severed), *appeal docketed*, No. 81-7142 (2nd Cir. Feb. 24, 1981); *Florida Businessmen for Free Enterprise v. Florida*, 499 F. Supp. 346 (N.D. Fla. 1980)

the Model Act which are pending decision.[5] It is worth noting that statutes not based on the Model Act have generally been held unconstitutional.[6]

(offense of possession, without mens rea of intent, severed), *appeal docketed*, No. 80-5813 (5th Cir. Oct. 9, 1980.)

But see the following cases holding particular provisions in statutes based on the Model Act impermissively vague and that the entire statute is unconstitutional. *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916 (6th Cir. 1980), *vacated and remanded*, 49 U.S.L.W. 3882 (U.S. May 26, 1981) (No. 80-1507); *Lazy J., Ltd. v. Borough of State College*, Civ. No. 80-1167 (M.D. Pa. Jan. 30, 1981); *Back Door Records v. City of Jacksonville*, No. LR-C-80-314 (E.D. Ark. Jan. 8, 1981); *General Stores, Inc. v. City of Albuquerque*, No. 81-0027-M, Civil (D.N. Mex. March 23, 1981) (modified version of Model Act); *Weiler v. Carpenter*, 507 F. Supp. 837 (D.N. Mex. 1981); *Brache v. County of Westchester*, 507 F. Supp. 566 (S.D.N.Y. 1981) (modified version of Model Act in which substantive offense did not contain element of specific intent), *appeal docketed*, No. 81-7211 (2nd Cir. June 3, 1981). In *Lazy J., Ltd., Back Door Records*, and *Weiler*, the courts relied on the decision of the United States Court of Appeals in *Record Revolution No. 6, Inc. v. City of Parma*. Of course, that decision has been vacated by this Court and in any event the limited basis of the holding in that case renders the decision of little precedential value.

[5] *Michael A. Enloe v. Polk County*, Civ. 80-416-B (S.D. Iowa, filed Oct. 9, 1980); *George L. Powell, Jr. and Harpo's Music, Inc. v. City of Hopkins*, Civ. 3-80-511 (D. Minn., filed 1980); *Freak Imports v. Woods*, CA 4-80-249K (N.D. Texas, filed 1980); *Progressive Businessmen's Ass'n of Idaho, Inc. v. Kelly Pearce*, No. 71847 (4th Jud. Dist. of State of Idaho, Oct. 31, 1980), *appeal docketed*, No. 1392 (Sup. Ct. of Idaho); *Pennsylvania Accessories Trade Ass'n, Inc. v. Thornburgh*, No. 81-126 (M.D. Pa., filed Jan. 28, 1981); *Jack Garner v. Frank White*, No. LRC 81-57 (D. Ark., filed Feb. 13, 1981); *The Town Tobacconist v. Dazzalli*, No. C-2198 (Super. Ct. Ch. N.J. March 12, 1981), *appeal docketed*, No. A-2991-80-T2 (N.J. Super. Ct. App. Div., April 1, 1981); *Lady Ann's Oddities, Inc. v. Macy*, No. Civ. 81-500-BT (W.D. Okla., filed April 13, 1981); *Eucalyptus Records and Tapes, Inc. v. Dunlap*, No. 81-4742 (2nd Jud. Dist. Ct. of Nev., filed May 22, 1981); *Vana Murphy, dba The Store v. Scott Matheson*, No. NC-81-0058 (D. Utah, filed June 2, 1981); *Kansas Retail Trade Coop. v. Robert P. Stephen*, No. 81-1265 (D. Kan. filed June 24, 1981); *Eucalyptus Records & Tapes N.W., Inc. v. Charles R. James*, No. C-81-402 RJM (E.D. Wash., filed June 30, 1981).

[6] *See, e.g.*, statutes which have been held unconstitutional in *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980); *Record*

The Model Act consists basically of four essential components. First, there is a definition which provides that "'drug paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use" in connection with a controlled substance. Second, as a part of the definition, there is a list of examples of the many common forms of property that can be drug paraphernalia if "used, intended for use, or designed for use" to violate the illegal drug laws. Third, as a part of the definition, the Model Act names several relevant factors which "a court or other authority shall consider in addition to all other logically relevant factors," in determining whether the necessary criminal intent is present so as to constitute an object as drug paraphernalia. Finally, there are the substantive criminal offenses. The Model Act prohibits the use or possession with intent to use drug paraphernalia. It also defines the offense of delivery, possession with intent to deliver, or manufacture with intent to deliver drug paraphernalia, when the deliverer, possessor or manufacturer knows or reasonably should know that the drug paraphernalia will be used with controlled substances. It is further made unlawful for any person to place any advertisement knowing, or under circumstances where one should reasonably know, that the purpose of the advertisement is to promote the sale of objects designed or intended for use as drug paraphernalia.

Head Corp. v. Sachen, 498 F. Supp. 88 (E.D. Wis., 1980); *Gasser v. Morgan*, 498 F. Supp. 1154 (N.D. Ala. 1980); *Magnani v. City of Ames, Ia.*, 493 F. Supp. 1003 (S.D. Ia 1980); *Music Stop, Inc. v. City of Ferndale*, 488 F. Supp. 390 (E.D. Mich. 1980); *Knoedler v. Roxbury Township*, 485 F. Supp. 990 (D.N.J. 1980); *Record Museum v. Lawrence Township*, 481 F. Supp. 768 (D.N.J. 1979); *Bambu Sales, Inc. v. Gibson*, 474 F. Supp. 1297 (D.N.J 1979); *Weingart v. Oyster Bay*, No. 79-C-2932 (E.D.N.Y. Jan. 9, 1980); *Indiana Chapter, N.O.R.M.L., Inc. v. Sendak*, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980); *Smith v. Roark*, No. 80-2110 (S.D.W. Va. May 13, 1981); *Florida Businessmen for Free Enterprise v. Pinellas County*, No. 80-482 Civ. -T-H (M.D. Fla. May 15, 1980).

As the Court of Appeals for the Seventh Circuit observed in the case at bar, 639 F.2d at 376, the Village of Hoffman Estates Ordinance No. 969-1978 differs substantially from the Model Act enacted by amici. The ordinance there is a licensing law and requires the retailers subject to licensure to file affidavits establishing that the applicant and all employees authorized to sell the items covered have never been convicted of a drug related offense. The ordinance also requires a licensee to keep records, available for police inspection, of the name and address of every purchaser for each item sold. The ordinance prohibits the sale or transfer of the items covered to minors. However, of significant importance to amici, the ordinance defines the items sought to be regulated as:

> "any item, effect, paraphernalia, accessory or thing which is *designed* or marketed *for use* with illegal cannibus or drugs." Ord. No. 969-1978, Sec. 1 (emphasis supplied).

The Seventh Circuit was unable to find the ordinance at issue in *Flipside* as carefully drafted and structured as is the Model Act. In the Model Act an essential element of proof in every case is a showing of specific intent of the person charged. The specific intent incorporated into the Model Act has two aspects: defining "drug paraphernalia" and delineating the elements of the substantive offense. *Mid-Atlantic Accessories Trade Ass'n v. Maryland, supra*, 500 F. Supp. at 844. Furthermore, the Model Act contains guidelines to be used in determining whether an object is drug paraphernalia. These are the critical differences between the Model Act and the ordinance at issue in *Flipside. Flipside, Etc. v. Village of Hoffman Estates, supra*, 639 F.2d at 376, 386.

The lower court decision of the Seventh Circuit in *Flipside* found this "designed for use" phrase in the context of the ordinance unconstitutionally vague in

violation of the Fourteenth Amendment to the United States Constitution.

Amici may thus be affected by this Court's decision in *Flipside*, since the Model Act contains the phrase "designed for use," albeit in a different context.

In the context of the Model Act, the majority of the lower courts have adopted a construction of the "designed for use" phrase which renders all the elements of the definition consistent with the recognized purposes and intent of the Act. These courts have rejected the contentions that the definition of drug paraphernalia is defective in failing to specify whose design is relevant and that "designed for use" refers to the physical attributes of an object rather than to the intent of the person charged with a violation. As the U.S. District Court for the District of Maryland reasoned in *Mid-Atlantic Accessories Trade Ass'n v. Maryland, supra:*

> "Such an interpretation amounts to a misreading of the statute. The person who must use an item, design it for use, or intend it for use with drugs in order for it to be drug paraphernalia, is the person charged with one of the Act's substantive violations. This interpretation, which is highly favorable to the accused in a criminal prosecution, is the one given to the same language by all the other courts that have had the Model Act before them. *See Florida Businessmen v. City of Hollywood, supra*, and the other cases cited herein. This is also the interpretation given to similar language in statutes designed to assist in the enforcement of the National Prohibition Act. *See, e.g., United States v. Brunett*, 53 F.2d 219 (W.D. Mo. 1931).
>
> This interpretation is also consistent with other provisions of the Act. As Judge Stapleton [of the U.S. District Court for the District of Delaware] pointed out in *Delaware Accessories, supra*, 497 F. Supp. at 292, the Section prohibiting the sale of drug paraphernalia . . . is phrased specifically in terms of the

use to which the *buyer* puts the item. The Section defining drug paraphernalia is not. Thus, when the drafters of the Act wished to make relevant the use to which a remote purchaser would put the item, they flatly said so. When they did not specifically mention the user's intent or future act, they quite obviously intended that such intent or future act was not relevant.

As Judge Stapleton also noted, the phrase 'designed for use' does not necessarily import objective factors into the statute. 497 F. Supp. at 921. 'Design' connotes an intentional act as well as an objective set of characteristics. When considered in the context of this statute, it is clear that it is the subjective, intentional sense in which 'designed' is used.

The fact that 'designed for use' and 'intended for use' are used in the disjunctive throughout the Act does not necessarily indicate that each of the two phrases means something entirely different. Rather, it is apparent from a reading of the Act in its entirety that all three verbs (i.e. used, designed and intended) were included in the definition of drug paraphernalia so that the terms would be applicable to all the kinds of conduct barred in the Act's substantive sections. A seller will 'intend' an item for use, while a manufacturer is more likely to 'design' an item for use, and a user will simply 'use' the item."

500 F. Supp. at 844. *Accord, The Casbah, Inc. v. Thone, supra,* Slip Op. at 13-14; *Heijira Corp. v. MacFarlane, supra,* Slip Op. at 24; *Brache v. County of Westchester, supra,* 507 F. Supp. at 577-578; *New England Accessories Trade Ass'n, Inc. v. Browne, supra,* 502 F. Supp. at 1251; *Tobacco Accessories and Novelty Craftsmen Merchants Ass'n v. Treen, supra,* 501 F. Supp. at 169-170; *Delaware Accessories Trade Ass'n v. Gebelein, supra,* 497 F. Supp. at 291-293; *New England Accessories Trade Ass'n, Inc. v. City of Nashua, supra,* slip Op. at 11; *Florida Businessmen for Free Enterprise v. City of Hollywood, supra,* Slip Op. at 7-8. Clearly, the teaching of this legion of decisions is that

where specific intent is contained in a statute and the focus is on the persons with the criminal state of mind, words such as "designed for use" are constitutional. *See Screws v. United States*, 325 U.S. 91, 103 (1945); *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952); *United States v. Price*, 383 U.S. 787, 806 n. 20 (1966).

Furthermore, there are many existing federal statutes regulating other types of paraphernalia (*e.g.*, implements of crime) which utilize the terms "designed for use" and/or "intended for use" and which have repeatedly withstood constitutional attack. (*See* Appendix B). The National Prohibition Act, ch. 85, 41 Stat. 313 (1919), for example, provided:

> "It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe *advertised, designed, or intended* for use in the unlawful manufacture of intoxicating liquor." Title 2, Sec. 18 of the National Prohibition Act (emphasis supplied).

The federal decisions interpreting the language of this section and that of its successor, 26 U.S.C. § 5686 (1976), have consistently held when applying it to sellers that the terms "designed" and "intended for use" refer to the defendant charged, not to some hypothetical third party. *United States v. Brunett*, 53 F.2d 219, 230 (W.D. Mo. 1931). *See also Weinstein v. United States*, 293 F. 388, 389 (1st Cir. 1923); *Stroh Products v. Davis*, 8 F.2d 773, 776 (E.D. Mich. 1925); *Jones v. United States*, 11 F.2d 98, 99 (4th Cir.), *cert. denied*, 271 U.S. 682 (1926); *United States v. Nomel Products Co.*, 47 F.2d 575, 577 (2d Cir. 1931); *Israel v. United States*, 63 F.2d 345, 346 (3rd Cir. 1933); *United States v. 2265 One-Gallon Paraffined Tin Cans*, 260 F.2d 105, 108 (5th Cir. 1958); *Chapman v. United States*, 271 F.2d 593, 596 n. 3 (5th Cir. 1959).

In *Stroh Products Co. v. Davis, supra*, the court explained that the terms "designed" and "intended" were used in the National Prohibition Act to be alternatively applicable depending on the type of activity the defendant is charged with:

> "[W]hatever difference there may be in the meaning of the words 'designed' and 'intended' is fully explained by the multiplicity of subjects which the two adjectives serve; it being more natural to say that a still is designed for the manufacture of unlawful liquor, and that a preparation or compound is intended for use in the manufacture of unlawful liquor." 8 F.2d at 777.

Similarly, the use of the terms "used", "designed for use" and "intended for use" in the Model Act will vary as appropriate with the given defendant and the act for which he is charged; in each situation, the defendant's criminal intent is the focus.

Certainly the cases indicate that the language by itself is not vague. Further, when the "designed for use" language is coupled with a specific intent requirement, any vagueness problem is obviated. Thus, as amici assert, in the context of the Model Act the phrase "designed for use" is constitutional.

CONCLUSION

In reaching a decision in this case amici urge the Court to recognize that statutes which contain the term "designed for use" must be judged in the context in which the term is employed. In the example of the well-drafted and carefully articulated standards of the Model Act, "designed for use" is clearly constitutional.

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APPENDIX

MODEL DRUG PARAPHERNALIA ACT

Drafted by the

Drug Enforcement Administration

of the

United States Department of Justice

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With

Prefatory Note and Comments

MODEL DRUG PARAPHERNALIA ACT

Prefatory Note

The Uniform Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Laws, has been enacted by all but a handful of states. The Uniform Act does not control the manufacture, advertisement, sale or use of so-called "Drug Paraphernalia." Other state laws aimed at controlling Drug Paraphernalia are often too vaguely worded and too limited in coverage to withstand constitutional attack or to be very effective. As a result, the availability of Drug Paraphernalia has reached epidemic levels. An entire industry has developed which promotes, even glamorizes, the illegal use of drugs by adults and children alike. Sales of Drug Paraphernalia are reported as high as three billion dollars a year. What was a small phenomenon at the time the Uniform Act was drafted has now mushroomed into an industry so well-entrenched that it has its own trade magazines and associations.

This Model Act was drafted, at the request of state authorities, to enable states and local jurisdictions to cope with the paraphernalia problem. The Act takes the form of suggested amendments to the Uniform Controlled Substances Act. The Uniform Act is extremely well-organized. It

contains a definitional section, an offenses and penalties section, a civil forfeiture section, as well as miscellaneous sections on administration and enforcement. Instead of creating separate, independent paraphernalia laws, it seems desirable to control Drug Paraphernalia by amending existing sections of the Uniform Controlled Substances Act.

Article I provides a comprehensive definition of the term "Drug Paraphernalia" and includes particular descriptions of the most common forms of paraphernalia. Article I also outlines the more relevant factors a court or other authority should consider in determining whether an object comes within the definition.

Article II sets out four criminal offenses intended to prohibit the manufacture, advertisement, delivery or use of Drug Paraphernalia. The delivery of paraphernalia to a minor is made a special offense. Article II clearly defines what conduct is prohibited, and it specifies what criminal state of mind must accompany such conduct.

Article III provides for the civil seizure and forfeiture of Drug Paraphernalia. Civil forfeiture can be an effective deterrent, particularly to commercial suppliers whose capital is invested in inventory. Civil forfeiture can also be utilized in circumstances where criminal penalties seem unjustified.

ARTICLE I

(Definitions)

SECTION (insert designation of definitional section) of the Controlled Substances Act of this State is amended by adding the following after paragraph (insert designation of last definition in section):

"( ) The term 'Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing,

compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Act (meaning the Controlled Substances Act of this State). It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a concontrolled substance or from which a controlled substance can be derived;

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuanna;

(8) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs;

(m) Ice pipes or chillers;

"In determining whether an object is Drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this Act;

(4) The proximity of the object to controlled substances;

(5) The existence of any residue of controlled substances on the object;

(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(13) The existence and scope of legitimate uses for the object in the community;

(14) Expert testimony concerning its use."

ARTICLE II

(Offenses and Penalties)

SECTION (designation of offenses and penalties section) of the Controlled Substances Act of this State is amended by adding the following after (designation of last substantive offense):

"SECTION (A) (Possession of Drug Paraphernalia)

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

SECTION (B) (Manufacture or Delivery of Drug Paraphernalia)

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may

be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (C) (Delivery of Drug Paraphernalia to a Minor)

Any person 18 years of age or over who violates Section (B) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (D) (Advertisement of Drug Paraphernalia)

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

ARTICLE III

(Civil Forfeiture)

SECTION (insert designation of civil forfeiture section) of the Controlled Substances Act of this State is amended to provide for the civil seizure and forfeiture of drug paraphernalia by adding the following after paragraph (insert designation of last category of forfeitable property):

"( ) all drug paraphernalia as defined by Section ( ) of this Act."

ARTICLE IV

(Severability)

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity

does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

COMMENT [ARTICLE I]

Drug paraphernalia laws are most often attacked because they are too vaguely worded. They seldom explain what is meant by the term paraphernalia. They do not indicate whether it is the use, or the possession, or the sale of paraphernalia that is prohibited. Moreover, they are usually silent on the criminal state of mind that must accompany the prohibited conduct. This deprives an individual of fair warning as to what the law forbids. It also vests too much discretion in authorities to determine what property and what activities are controlled.

DEFINITION OF DRUG PARAPHERNALIA

Article I of the Model Act, in contrast, defines "drug paraphernalia" as equipment, products, and materials used, intended for use, or designed for use, essentially, to produce, package, store, test or use illicit drugs. The words "equipment, products and materials" should be interpreted according to their ordinary or dictionary meanings. They can apply to many forms of movable, tangible property. Real property, conveyances, monies, documents and intangible property are, on the other hand, not meant to be included within these terms.

Although this definition may appear too general in its wording, or too broad in its scope, there are so many forms of drug paraphernalia that any attempt to define the term in more specific language would guarantee major loopholes in the Act's coverage. The courts have repeatedly recognized that there are practical limitations in drafting legislation. Where the subject matter of a statute does not lend itself to exact description, the use of general language does not make the statute unconstitutionally vague. *United States v. Petrillo,* 332 U.S. 1, 67 S. Ct. 1538 (1947).

And see *United States v. Ryan*, 284 U.S. 167, 52 S. Ct. 65 (1931).

To insure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge or criminal intent of the person in control of an object a key element of the definition. Needless to say, inanimate objects are neither "good" nor "bad," neither "lawful" nor "unlawful." Inanimate objects do not commit crimes. But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people subjected to prosecution. Article I requires, therefore, that an object be used, intended for use, or designed for use in connection with illicit drugs before it can be controlled as drug paraphernalia.

Hinging the definition of drug paraphernalia on a specific intent to violate, or to facilitate a violation of, the drug laws also provides "fair warning" to persons in possession of property potentially subject to this Act. A statute is not unconstitutionally vague, if it embodies a specific intent to violate the law. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 72 S. Ct. 329 (1952); *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031 (1945).

Consider the application of Article I to a spoon, a hypodermic syringe, and a length of surgical tubing. Each object has legitimate uses in the community. None is specifically designed for illegal use. Thus, when these objects are manufactured, delivered and possessed in lawful commerce, they are not considered paraphernalia. But, if these same objects are assembled and used by an addict to illegally melt heroin and inject it into his body, they become drug paraphernalia. As such they become forfeitable under Article III, and the addict becomes subject to prosecution under Section A of Article II.

Actual use of an object to produce, package, store, test or use illicit drugs need not always be shown. An object is considered to be drug paraphernalia whenever the person

in control intends it for use with illicit drugs. This intent may be a generalized one, not necessarily pinpointing a specific time and place of future use. See *Palmer v. State*, 14 Md. App. 159, 286 A.2d 572 (1972). It can be proved directly such as by admissions of the person in control, or indirectly through circumstantial evidence. It should be noted that the person in immediate control of an object need not intend to use it personally in connection with drugs. It is enough if he holds the object with the intent to make it available to persons whom he knows will use it illegally. See *United States v. 2265 One-Gallon Paraffined Tin Cans*, 260 F.2d 105 (5th Cir. 1958).

Objects whose sole, or at least dominant purpose is to produce, package, store, test or use illicit drugs are considered to be "designed" for such use. A rebuttable presumption exists that these objects are intended for use for the purpose for which they are designed. See *Israel v. United States*, 63 F.2d 345 (3rd Cir. 1933). As such, they are presumed to be drug paraphernalia. Isomerization devices designed for use in increasing the THC content of marihuana provide a good example.

COMMON FORMS OF DRUG PARAPHERNALIA

Article I includes a detailed description of common forms of property that can fall within the definition of drug paraphernalia if used, intended for use, or designed for use to violate the drug laws. This list is not intended to be inclusive. Several of these descriptions, such as "chillums" and "bongs," may seem foreign to the lay reader. Nevertheless, these terms are part of the jargon of the drug culture and are understood by both users and merchants of drug paraphernalia. They are not unconstitutionally vague. See *Hydgrade Provision Co. v. Sherman*, 266 U.S. 497, 45 S. Ct. 141 (1925).

RELEVANT FACTORS IN CLASSIFYING PARAPHERNALIA

In addition to defining drug paraphernalia and describing the common forms, Article I sets out some of the more relevant factors to consider in determining whether an

object is paraphernalia. The listing of these factors in the Model Act is not intended to be peremptory; a court or other authority is not obligated to hear evidence on, or to consider, every listed factor. Rather, the factors have been included to guide law enforcement officers, judges, and juries in their determination of what is controlled. Providing guidance on the practical application of the Act minimizes the risk of arbitrary and descriminatory enforcement, sometimes associated with even the most carefully drafted statutes. See *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676, 88 S. Ct. 1298 (1968).

Conversely, the listing of these factors is not meant to be inclusive. Any logically relevant factor may be considered.

COMMENT [ARTICLE II]

POSSESSION OF DRUG PARAPHERNALIA

Section A makes it a crime to: (i) possess an object; (ii) classifiable as drug paraphernalia; (iii) with the intent to use that object, essentially, to produce, package, store, test or use illicit drugs in violation of the Controlled Substances Act of the State. Section A does not make the mere possession of an object capable of use as drug paraphernalia a crime. Section A does not make the mere intent to violate the drug laws a crime. It is the possession of drug paraphernalia accompanied by an intent to use it to violate the drug laws that Section A forbids. Innocent citizens have nothing to fear from Section A.

It must be noted here that the activities of storing, testing and using illicit drugs are not in themselves violations of either the Uniform Controlled Substances Act or the federal Controlled Substances Act. But each activity necessarily includes the possession of illicit drugs, which is a violation of both laws.

MANUFACTURE OR DELIVERY OF DRUG PARAPHERNALIA

Suppliers who furnish goods or services knowing they will be used to facilitate a crime are not immune from liability. There are no legal obstacles to punishing sup-

pliers who knowingly or recklessly aid their customers to commit crimes. This is true whether the objects or services are restricted, or peculiarly suited for illegal use, such as a still, a gun, morphine or stolen goods. See *Direct Sales Company* v. *United States*, 319 U.S. 703, 63 S. Ct. 1265 (1943); *Backun v. United States*, 112 F.2d 635 (4th Cir. 1940); *Israel v. United States*, 63 F.2d 345 (3rd Cir. 1933); *Weinstein v. United States*, 293 F. 388 (1 Cir. 1923); and *Commonwealth v. Stout*, 356 Mass. 237, 249 N.E.2d 12 (1969).

It is also true when the objects or services have widespread legitimate uses in the community, such as sugar, rye, yeast, grapejuice, rubbing alcohol or a telephone answering service. See *United States v. Ragland*, 306 F.2d 732 (4th Cir. 1962); *Chapman v. United States*, 271 F.2d 593 (5th Cir. 1959); *United Cigar Whelan Stores Corp. v. United States*, 113 F.2d 340 (9th Cir. 1940); *Vukich v. United States*, 28 F.2d 666 (9th Cir. 1928); *United States v. Burnett*, 53 F.2d 219 (W.D. Mo. 1931); and *People v. Lauria*, 251 Cal. App.2d. 471 (1967).

The reasonableness of this rule is clearly expressed in *Backun v. United States*:

> "To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of a felony. In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assist-

ance by refusing to make the sale" 112 F.2d 635 (4th Cir. (1940)).

There are courts which have hesitated to hold a supplier guilty of conspiracy with, or of aiding and abetting a buyer. See *United States v. Falcone*, 311 U.S. 205, 61 S. Ct. 204 (1940); and *United States v. Peoni*, 100 F.2d 401 (2 Cir. 1938). A careful reading of these decisions makes clear that they were based upon the court's unwillingness to hold a supplier *equally* responsible with a buyer based simply upon the supplier's knowledge that the buyer intended to commit a crime. At common law, the punishment is the same for the co-conspirator and the aider and abetter as it is for the actual perpetrator. Nothing in these cases suggests, however, that a supplier enjoys complete immunity from punishment, or that a state cannot make the conduct of the supplier a separate offense. See Note, *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*, 53 Columbia Law Rev. 228 (1953).

Section B makes it a crime to: (i) deliver, possess with intent to deliver, or manufacture with intent to deliver an object; (ii) classifiable as drug paraphernalia, (iii) knowing, or under circumstances where one reasonably should know, that it will be used, essentially, to produce, package, store, test or use illicit drugs in violation of the Controlled Substances Act of the State. The term "deliver" has the same basic meaning attributed to it by the Uniform Controlled Substances Act; namely, the actual, constructive, or attempted transfer from one person to another, whether or not there is an agency relationship. The term "manufacture," appearing in the phrase "manufacture with intent to deliver," is used in a general sense to express the entire process by which an object is made ready for sale in open commerce, including designing, fabricating, assembling, packaging and labeling. See *Danovitz v. United States*, 281 U.S. 389, 50 S. Ct. 344 (1930).

The knowledge requirement of Section B is satisfied when a supplier: (i) has actual knowledge an object will be

used as drug paraphernalia; (ii) is aware of a high probability an object will be used as drug paraphernalia; or (iii) is aware of facts and circumstances from which he should reasonably conclude there is a high probability an object will be used as drug paraphernalia. Section B requires a supplier of potential paraphernalia to exercise a reasonable amount of care. He need not undertake an investigation into the intentions of every buyer, but he is not free to ignore the circumstances of a transaction. Suppliers of objects capable of use as paraphernalia may not deliver them indiscriminately. Since each element of Section B must be proven beyond a reasonable doubt, legitimate, prudent suppliers will not be affected by this section.

ADVERTISEMENT OF DRUG PARAPHERNALIA

Section D makes it a crime to: (i) advertise an object; (ii) classifiable as drug paraphernalia; (iii) knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement is to promote the sale of the object for use, essentially, to produce, package, store, test or use illicit drugs.

Only printed advertisements promoting the sale of objects for use as paraphernalia are prohibited. The non-printed media, including radio and television, is not affected. Printed matter criticising the drug laws, glorifying the drug culture, glamorizing the use of drugs, or providing information or instructions on illicit drugs is not affected. The target of this Section is commercial advertising.

Unlike so-called "printer's ink" statutes, which exempt printers and publishers from their coverage, Section D contains no exemptions. It applies to anyone who prints or publishes paraphernalia advertisements, and to anyone who causes these advertisements to be printed or published. For this reason, it uses the general terms "any person" and "to place."

The knowledge requirement of Section D is satisfied when the person placing the advertisement: (i) has actual knowledge it is promoting the sale of objects for use as drug paraphernalia; (ii) is aware of a high probability it is promoting the sale of objects for use as drug paraphernalia; or (iii) is aware of facts and circumstances from which he should reasonably conclude there is a high probability the advertisement is promoting the sale of objects for use as drug paraphernalia. Whether an advertisement promotes the sale of objects for use as paraphernalia is to be determined from its content. Under Section D, one need not look beyond the face of the advertisement.

Section D does not compromise First Amendment rights. The sale of objects for use as drug paraphernalia is made illegal by Section B, and Section D simply prohibits advertisements promoting these sales. Commercial solicitation of illegal activities is not protected speech. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights*, 413 U.S. 376, 93 S. Ct. 2553 (1973); and see *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817 (1976).

COMMENT [ARTICLE III]

Civil forfeiture actions are directed against property and are totally independent of any criminal proceedings against individuals. Section 505 of the Uniform Controlled Substances Act provides for the seizure and civil forfeiture of: (1) illicit drugs; (2) equipment and materials used to make, deliver, import or export illicit drugs; (3) containers used to store illicit drugs; (4) conveyances involved in transporting illicit drugs; and (5) books, records and research connected with illicit drugs. States that have adopted Section 505 can seize these objects without making any compensation to the owners. The legality of civil forfeiture statutes, similar to 505, and their usefulness in helping deter crime, have been repeatedly recognized by virtually every state and federal court, including

the Supreme Court of the United States. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S. Ct. 2080 (1974).

Article III extends the civil forfeiture section of the Uniform Act to include drug paraphernalia. This allows states to keep and destroy drug paraphernalia, rather than returning it after criminal proceedings have ended. It also allows states to keep drug paraphernalia seized during an investigation, in cases where criminal proceedings are not initiated. Finally, since the standard of proof in a civil forfeiture action is simply "probable cause," or "reasonable cause," rather than "proof beyond a reasonable doubt," Article III permits states to seize and forfeit drug paraphernalia in circumstances where an arrest might not seem justified. For example, an officer who encounters a minor in possession of a hypodermic syringe, or in possession of a bong (a device especially designed for smoking marihuana), has reasonable cause to believe these objects are intended for use to introduce illicit drugs into the human body. Subjecting drug paraphernalia to civil forfeiture permits the officer to seize these objects, though he decides not to arrest the minor.

Civil forfeiture can also be an effective deterrent to commercial suppliers. See *Utley Wholesale Company v. United States*, 308 F.2d 157 (5th Cir. 1962); *United States v. 2265 One-Gallon Paraffined Tin Cans*, 260 F.2d 105 (5th Cir. 1958); *United States v. 1,922 Assorted Firearms, Etc.*, 330 F. Supp. 635 (ED Mo. 1971); *United States v. 600 Bags of Southcoast Jurbinado Brand Sugar*, 225 F. Supp. 705 (WD La. 1964); *Vinto Products Co. v. Goddard*, 43 F.2d 399 (D Minn. 1930); and *United States v. Roitman*, 36 F.2d 86 (ND Ill. 1929).

APPENDIX B

Federal statutes containing the terms "designed for use" and/or "intended for use" include:

7 U.S.C. § 136 (1976) — Environmental Pesticide Control Act — definitions.

7 U.S.C. § 2131 (1976) — Animal Welfare Act.

15 U.S.C. § 56 (1976) — False advertising.

15 U.S.C. § 70 (1976) — Textile Fiber Products Identification Act — definitions.

15 U.S.C. § 1171 (1976) — Transportation of Gambling Devices; *United States v. Various Gambling Devices*, 478 F.2d 1194, 1198 (5th Cir. 1973); *United States v. H.M. Branson Distributing Co.*, 398 F.2d 929, 934 (6th Cir. 1968), both holding that the definition of 'gambling device' is not constitutionally vague.

15 U.S.C. § 1191 (1976) — Flammable Fabrics Act.

15 U.S.C. § 1262(e) (1976) — Regulation of hazardous toys intended for use by children. *See Toy Mfrs. of America v. Consumer Products Safety Commission*, 630 F.2d 70, 77-78 (2d Cir. 1980).

15 U.S.C. § 1391 (1976) — Motor Vehicle Safety Standards.

17 U.S.C. § 509 (Supp. 1979) — Seizure and forfeiture provision for copyright infringement.

18 U.S.C. § 486 (1976) — Uttering coins.

18 U.S.C. § 492 (1976) — Forfeiture of counterfeit paraphernalia.

18 U.S.C. § 921 (1976) — Gun Control Act of 1968.

18 U.S.C. § 957 (1976) — Possession of property in and of foreign government.

18 U.S.C. § 1706 (1976) — Injury to things used or designed for use in conveyance of the mail.

18 U.S.C. § 1792 (1976) — Mutiny, riot, dangerous instrumentalities prohibited in federal prisons; *United States v. Hamilton*, 626 F.2d 348, 349 (4th Cir.),

cert. denied, 449 U.S. 902, (1980) (whether an article is a weapon or "thing designed to kill, injure, or disable" "depends not only upon the nature of the article but the intent with which it is used or conveyed by the individual.").

18 U.S.C. § 1953(a) (1976 & Supp. 1979) — Interstate transportation of wagering paraphernalia.

18 U.S.C. § 2512 (1976) — Manufacture, distribution, possession, and advertising of wire or oral communicating intercepting devices prohibited.

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26 U.S.C. § 5301 (1976 & Supp. 1979) — Regulation of traffic in containers of distilled spirits.

26 U.S.C. § 5763 (1976) — Forfeiture of tobacco paraphernalia.

26 U.S.C. § 5845 (1976) — Definitions of machine gun and destructive devices; *United States v. Markley*, 567 F.2d 523 (1st Cir. 1977), *cert. denied*, 425 U.S. 951 (1978); *United States v. Morningstar*, 456 F.2d 278

(4th Cir. 1971), *cert. denied*, 409 U.S. 896 (1972); *United States v. Campbell*, 427 F.2d 892 (5th Cir. 1970), *cert. denied*, 402 U.S. 975 (1971) (all holding that the definition of "destructive device" is not unconstitutionally vague).

33 U.S.C. § 1502 (1976) — Deepwater Ports.

49 U.S.C. § 1807 (1976) -- Transportation of radioactive materials on passenger-carrying aircraft.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
Appellant,

VS.

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COMMUNITY ACTION AGAINST DRUG ABUSE IN SUPPORT OF APPELLANT AND BRIEF AMICUS CURIAE OF COMMUNITY ACTION AGAINST DRUG ABUSE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	Page
Interest of amicus	5
Opinions below	5
Statement of the case	6
Summary of argument	7
Argument	8
The ordinance is sufficiently specific to provide fair warning and notice of standards of illegal conduct	8
Conclusion	19

TABLE OF AUTHORITIES CITED

Cases

Page

Danovitz v. United States, 281 U.S. 389 (1930) 16, 17
Grayned v. City of Rockford, 408 U.S. 104 (1972) 8, 9
Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925) 15, 16
McGowan v. State of Maryland, 366 U.S. 420 (1961) 14
United States v. Balint, 258 U.S. 250 (1922) 12, 13
United States v. Freed, 401 U.S. 601 (1971) 12, 13, 14
United States v. Greer, 588 F.2d 1151 (6th Cir. 1978) 13
United States v. McCauley, 601 F.2d 336 (8th Cir. 1979) 13
United States v. Powell, 423 U.S. 87 (1975) 12

Constitution

United States Constitution:
Article 1, Section 8, Clause 3 6
Article 1, Section 10 6
First Amendment 6, 8, 12
Fourth Amendment 6
Fifth Amendment 6, 8
Eighth Amendment 6
Tenth Amendment 6, 7
Fourteenth Amendment 6, 8
Fourteenth Amendment, Due Protection Clause 6

Ordinance

Village of Hoffman Estates (Illinois), City Ordinance No. 969-1978 "Providing for Regulatjon of Items Designed or Marketed for Use with Illegal Cannabis or Drugs" (February 20, 1978): 6, 13, 16, 17, 19, 20
Section 8-7-16A 6, 7, 9
Section 8-7-16C 6

Table of Authorities Cited

Rule

	Page
United States Supreme Court Rules, Rule No. 36	1

Statute

National Firearms Act, 26 U.S.C. Sections 5801, et seq.:	7, 11, 12, 13, 18
Section 5686(a)	16
Section 5845(b)	11
Section 5845(f)	11

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COMMUNITY ACTION AGAINST DRUG ABUSE IN SUPPORT OF APPELLANT

Pursuant to Supreme Court Rule No. 36, Community Action Against Drug Abuse respectfully moves this Court for leave to file the annexed brief amicus curiae. Appellant Village of Hoffman Estates has consented to the filing of this brief and such consent has been lodged with the Clerk of this Court. Consent has been withheld by appellee The Flipside, Hoffman Estates, Inc.

Community Action Against Drug Abuse is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of combating drug abuse. Community Action Against Drug Abuse has 8,000 individual members including parents, teachers, school administrators, school counselors, drug abuse counselors, and medical personnel who treat persons suffering from drug abuse problems. Organizational members of Community Action Against Drug Abuse include the Sacramento City School District, Board of Education; the Black Educators for Action; the Chinese-American Citizens Alliance; the Japanese-American Citizens League; the Association of Mexican-American Educators of Sacramento; the Sacramento Suburban Kiwanis Club; the California Third District PTA; the Sacramento Council PTA; the Sacramento City Teachers Association; the YMCA; the Sacramento-Nevada District United Methodist Church; the Carmichael Presbyterian Church; the Glen Oaks Swim and Tennis Club; the Pony Express District Boy Scouts; the Carmichael Optimist Club; and the Sacramento Metropolitan Chamber of Commerce.

All of the individual and organizational members of Community Action Against Drug Abuse are vitally interested in, and directly affected by, the serious physical and psychological damage to the youth of the community which is caused by the illegal use of controlled substances. Moreover, these individuals are equally interested in and affected by the impairment of educational achievement by the youth of this community caused by drug abuse and related problems.

The members of Community Action Against Drug Abuse also have a resolute interest in eliminating the open display and sale of drug paraphernalia because such display and sale:

1. undermine youth drug education programs;

2. increase the incidences of drug abuse by glamorizing and making socially acceptable the use of illegal drugs;

3. cause disrespect for the law by encouraging the disregard for existing laws banning the use and sale of controlled substances; and

4. create additional obstacles for parents attempting to prevent or resolve drug-related problems within their own families.

Community Action Against Drug Abuse is participating as amicus curiae in litigation in California supporting a Sacramento County ordinance which bans the distribution and display of drug paraphernalia. *United States Poster Stores, Inc. v. Duane Lowe, Sheriff of Sacramento County,* Civ. No. 289820, Sacramento County Superior Court (1980). Both the Sacramento County ordinance and pending state legislation banning drug paraphernalia were sponsored by individual members of Community Action Against Drug Abuse.

Because this Court's determination in the instant case could affect the validity of the state and local drug paraphernalia laws which Community Action Against Drug

Abuse or its members have sponsored, it is requested that this motion to file the annexed brief amicus curiae be granted.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of amicus curiae is set forth in the preceding motion for leave to file this brief.

OPINIONS BELOW

The opinion of the Court of Appeals is reported below as *The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, et al.*, 639 F.2d 373 (7th Cir. 1981). The opinion of the District Court, similarly entitled, is reported at 485 F. Supp. 400 (N.D. Ill. 1980).

STATEMENT OF THE CASE

On February 20, 1978, the Village of Hoffman Estates, Illinois (Village), enacted Ordinance No. 969-1978 "Providing for Regulation of Items Designed or Marketed for Use with Illegal Cannabis or Drugs" (Ordinance). Section 8-7-16A of the Ordinance provides:

> "It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor."

Section 8-7-16C of the Ordinance provides:

> "It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age."

After adoption of the Ordinance, the Village attorney made available "license guidelines" which defined certain terms relevant to the Ordinance. The Ordinance took effect May 1, 1978. Plaintiff filed this suit on May 30, 1978, alleging that the Ordinance violated the First, Fourth, Fifth, Eighth, and Fourteenth Amendments; Article I, Section 8, Clause 3; and Article I, Section 10 of the United States Constitution. The District Court, after denying preliminary relief and after trial, awarded judgment to the Village on February 11, 1980. Plaintiff appealed on several constitutional grounds alleging that the Ordinance is impermissibly vague, in violation of the Due Process Clause of the Fourteenth Amendment, and violates the First Amendment and the Equal Protection Clause of the Four-

teenth Amendment. The Court of Appeals found the Ordinance to be impermissibly vague on its face, declining to rule on the other grounds, and reversed the District Court. This Court noted probable jurisdiction on June 1, 1981.

SUMMARY OF ARGUMENT

The Court of Appeals erred in finding that the phrase "designed and marketed for use" with illegal drugs was impermissibly vague. The court was particularly concerned with the term "designed." "Designed" has a clear dictionary meaning as "devised for a specific function." The concept of "designed for use" as used in the National Firearms Act has been upheld against vagueness challenges, even though the Act does not require scienter and has criminal penalties. The Court of Appeals wrongly rejected the standard that business people of ordinary intelligence are able to understand exceptions in laws regulating their businesses, particularly when the District Court had found that plaintiff had retailed items which are drug paraphernalia for three years prior to the effective date of the Ordinance and that when the Ordinance took effect, plaintiff unerringly removed all items of paraphernalia from its shelves.

Courts should not confuse protection of differing "lifestyles" and "political views" with license to disregard society's regulation of inherently dangerous objects. There is no conceivable constitutional right to sell items which facilitate and encourage the use of illegal drugs.

ARGUMENT

THE ORDINANCE IS SUFFICIENTLY SPECIFIC TO PROVIDE FAIR WARNING AND NOTICE OF STANDARDS OF ILLEGAL CONDUCT

The Court of Appeals held that the Ordinance denies due process of law under the Fifth and Fourteenth Amendments to the United States Constitution in that the Ordinance is impermissibly vague on its face. *Flipside*, 639 F.2d at 386. It is interesting that this holding relied chiefly on the case of *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

In *Grayned*, a group of black students was convicted of violating both an antipicketing ordinance and an antinoise ordinance after a demonstration for equal rights near their high school. While the conviction under the antipicketing ordinance was overturned as a denial of equal protection, the conviction pursuant to the antinoise ordinance was upheld against charges of vagueness and overbreadth. The antinoise ordinance read, in pertinent part:

> "'[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.'" *Id.* at 107-08.

Although recognizing the impact of the ordinance on First Amendment rights of freedom of speech, the Court found that the vagueness of the term "noise or diversion" was dispelled by the ordinance's requirements that: (1) the noise or diversion be actually incompatible with nor-

mal school activity; (2) there be a demonstrated causality between the disruption that occurs and the noise and diversion; and (3) the act be "willfully done." *Id.* at 113-14.

By comparison, the drug paraphernalia ordinance is much more specific in limiting the regulated equipment to that designed or marketed for use with illegal cannibis or drugs as defined by Illinois Revised Statutes. Ordinance, Section 8-7-16A; *Flipside*, 639 F.2d at 378. The Ordinance is further made specific by publication of license guidelines which further define items included under the term drug paraphernalia. *Id.* at 379. As in *Grayned*, the incompatibility and the demonstrated causality appear within this definition of drug paraphernalia through specifying the nexus of "designed or marketed for use" with drugs made illegal by state law. In affirming the conviction in *Grayned*, the Court said:

> "As always, enforcement requires the exercise of some degree of police judgment, but as confined, that degree of judgment here is permissible. The Rockford City Council has made the basic policy choices, and has given fair warning as to what is prohibited. '[T]he ordinance defines boundaries sufficiently distinct' for citizens, policemen, juries, and appellate judges. [Footnote omitted.] It is not impermissibly vague." *Id.* at 114.

Here, the Board of Trustees of the Village of Hoffman Estates made the basic policy choice to regulate drug paraphernalia and to prohibit entirely the sale or distribution of drug paraphernalia to minors. The issue is whether the Ordinance used for this purpose has given fair warning as to what is prohibited.

As the Court of Appeals recognized, the key phrase in the Ordinance is that referencing paraphernalia "*'which is designed or marketed for use with illegal cannabis or drugs.'*" *Flipside*, 639 F.2d at 380 (emphasis in original). The court stated:

> "'It is unclear what is meant by an instrument "designed" for drug use. The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the ordinance] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.'" *Id.*

This statement, the crux of the Court of Appeals' holding, ignores the simple device, available to anyone, of going to the dictionary to see what the word "designed" means and governing one's conduct accordingly. Webster's Third New International Dictionary (1971) defines the verb "design" as "to devise or propose for a specific function" and "to plan or produce with special intentional adaptation to a specific end."

Black's Law Dictionary (1968) defines the term "designed" as "[c]ontrived or taken to be employed for a particular purpose."

It is thus readily apparent that ordinary devices which are produced for such uses as paper clips, tie bars, hand mirrors, and aluminum foil normally have, *i.e.*, to fasten papers and ties, admire one's countenance, or roast fowl, are not designed for use with illegal drugs and are not within the scope of the Ordinance. On the other hand, as in the present case, where Flipside's display items included "a mirror, about seven by nine inches with the word 'Cocaine' painted on its surface in a purple color" (*Flipside*, 485 F. Supp. at 403), one would have to be most naive not to be aware that said mirror was devised for the specific purpose of laying out one's lines of cocaine, *i.e.*, designed for use with illegal drugs.

The term "designed" is no mere local aberration. It is used, for example, in the National Firearms Act, 26 U.S.C. §§ 5801, *et seq.*, dealing with registration and taxation of certain dangerous weapons. That Act defines a machine gun as any weapon which

> "*is designed* to shoot . . . automatically more than one shot . . . by a single function of the trigger. The term shall also include . . . any combination of parts *designed* and intended *for use* in converting a weapon into a machine gun." 26 U.S.C. § 5845(b) (emphasis added).

The National Firearms Act also covers

> "any combination of parts either *designed* or intended *for use* in converting any device into a destructive device as defined . . . . The term 'destructive device' shall not include any device which is neither *designed* nor redesigned *for use* as a weapon." 26 U.S.C. § 5845(f) (emphasis added).

In *United States v. McCauley*, 601 F.2d 336 (8th Cir. 1979), the court upheld the National Firearms Act against a vagueness challenge. The defendant took issue with his conviction of possession of an unregistered machine gun. He alleged that the Act's definition of machine gun as a weapon *designed* to shoot automatically more than one shot by a single function of the trigger did not give fair warning of what was required or proscribed or provide a sufficiently definitive standard for nonarbitrary application by the jury and also permitted a conviction without scienter for an innocent act. The factual basis of McCauley's defense was that the gun in question would not fire automatically because it lacked an irreplaceable part, a magazine. *Id.* at 339-40. The court, relying on *United States v. Powell*, 423 U.S. 87, 92 (1975), held that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand and found that the defendant did not possess the machine gun merely as a curio. As to scienter, the court relied on *United States v. Freed*, 401 U.S. 601 (1971), in which this Court rejected a blanket attack on the National Firearms Act. This Court characterized the Act as "a regulatory measure in the interest of the public safety" (*id.* at 609), and concluded that the highly dangerous character of the regulated matter justified a finding of liability under the Act without a specific finding of criminal intent. *Id.*

The Court in *Freed* (*id.* at 609-10) quoted from *United States v. Balint*, 258 U.S. 250 (1922), in which the defendant was convicted of sale of narcotics over his defense that he did not know the drug was covered by a federal act:

> "It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the government, and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic. Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and, if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." *Id.* at 253-54.

The holdings in *Freed* and *Balint* overrule the Court of Appeals' holding that the perceived vagueness of the Ordinance is intensified by the fact that the manufacturer, not the retailer, designs the items sold and it is thus the design intent of the manufacturer, not the retailer, which triggers the retailer's duty under the Ordinance. The Court of Appeals suggested there would be little question of invalidity were this a criminal ordinance. *Flipside,* 639 F.2d at 381 n.18. However, in *United States v. Greer,* 588 F.2d 1151 (6th Cir. 1978), the court found that the National Firearms Act was concerned with clearly identifiable weapons which were the cause of increasing violent crime and which had no lawful uses. Under these circumstances,

> " 'the intent of the user of these weapons was irrelevant, as they were so prone to abuse that they were considered *per se* dangerous and unnecessary for legitimate pursuits.' " *Id.* at 1156 (emphasis in original).

The same reasoning should be applied to these weapons of drug abuse in the violent war being waged upon our society by the illegal drug industry.

The Ordinance here at issue is also a regulatory measure in the interest of the public safety. The national epidemic of illegal drugs requires strong measures to prevent the facilitation and glamorization of drug abuse. Here, as in *Freed*, the highly dangerous character of the regulated matter, when used for its designed purpose, justifies transference of the design intent of drug paraphernalia from the manufacturer to the merchandiser.

The Court of Appeals' concern that some drug related design might be foisted off by the manufacturer upon some unsuspecting retailer, thereby requiring him to obtain a license (639 F.2d at 381), is naive beyond words. The court rejected the standard set forth in *McGowan v. Maryland*, 366 U.S. 420, 428 (1961), that business people of ordinary intelligence are able to know what exceptions are encompassed in a statute regulating their business either as a matter of ordinary commercial knowledge or by simply making an investigation. The Court of Appeals held that to apply the *McGowan* analysis here would presuppose that the retailers are engaged in the business of selling items "'designed or marketed for use with illegal cannabis or drugs.'" *Flipside*, 639 F.2d at 383.

To make this statement, the Court of Appeals had to ignore the relevant findings by the trier of fact. The District Court found that for more than three years prior to the effective date of the Ordinance, the Flipside had sold various items such as the aforementioned mirror with the

word "Cocaine" painted in purple on the surface, literature that included "Marijuana Grower's Guide" and "A Child's Garden of Grass," and the bible of the drug, and particularly drug paraphernalia, industry, the magazine "High Times." *Flipside,* 485 F. Supp. at 403.

The District Court further found:

> "Proof that these conclusions [that the Ordinance was not vague] are valid is best shown by the conduct of those who acted on plaintiff's behalf. As soon as they were advised that the subject ordinance was in force, they unerringly went to the shelves in plaintiff's store and removed all items they thought fell within the ban of the new law, a total of 72. The court has examined each; they are described in the record of this case. Their removal from the shelves of plaintiff's store successfully placed it in compliance with the ordinance. Defendants concede that plaintiff no longer is selling any 'items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes . . .'. Obviously, plaintiff was not hampered by any vagueness in the words of the subject ordinance." *Id.* at 407.

Obviously, neither was the defendant nor the District Court. The District Court was fully aware that Flipside, being in the paraphernalia business, knew exactly what paraphernalia was.

In *Hygrade Provision Co. v. Sherman,* 266 U.S. 497 (1925), the Court rejected an allegation that the word "kosher" was so indefinite and uncertain as to cause a law prohibiting sale of falsely labeled "kosher" meats to be

unconstitutional. The Court concluded that the term "kosher"

> "has a meaning well enough defined to enable one engaged in the trade to apply it." *Id.* at 502.

Similarly, those engaged in this trade of drug paraphernalia must be deemed to be fully aware of the meaning of the term drug paraphernalia and be able to conform their conduct accordingly.

In this regard, the Ordinance is analogous to statutes such as the federal moonshine paraphernalia provision in the Internal Revenue laws, 26 U.S.C. § 5686(a), which provides, in pertinent part:

> "It shall be unlawful to have or possess *any* . . . *property intended for use* in violating any provision [of the Internal Revenue laws and regulations relating to liquor] . . . or which has been so used, and every person so having or possessing or using such . . . property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both." (Emphasis added.)

Over the past 60 years, this moonshine paraphernalia statute has been applied to all kinds of objects having otherwise legal uses. In *Danovitz v. United States,* 281 U.S. 389 (1930), Justice Holmes addressed the question whether containers, corks, labels, cartons, and other "legitimate" objects could be seized under the Internal Revenue laws.

> "We are of the opinion . . . that if the empty containers and the other objects seized were offered for

> sale in such a mode as purposely to attract purchasers who wanted them for the unlawful manufacture, as we interpret the word, they were *designed* for that manufacture and could be seized." *Id.* at 397 (emphasis added).

Thus, even though the moonshine law is more broadly worded than the Ordinance at issue, this Court had no difficulty in upholding the seizure of otherwise innocent items when those items were offered for sale in such a mode as purposely to attract purchasers who wanted said items for unlawful purposes. The *Danovitz* opinion thus parallels the designed or marketed provisions of the Ordinance which similarly regulates paraphernalia offered for sale in a manner purposely intended to attract purchasers who want the items for unlawful purposes.

Because the law is so clear on the issue of providing fair warning, amicus is concerned that other issues may have influenced the Court of Appeals' ruling. That court noted its difficulty of determining what is drug paraphernalia.

> " 'when something as innocuous and susceptible of legal or merely decorative use as a "marijuana pipe" is involved. Whether selling this merchandise falls within the ordinance's prohibition is a debatable question, *particularly when conflicting lifestyles and political views suffuse the decision maker's perception of what buyers will do with the product.*'
>
> "We find that there does exist a genuine danger that enforcement of this ordinance will be used to harass

> individuals choosing lifestyles and views different from those of the majority culture." *Flipside,* 639 F.2d at 383-84 (emphasis added by Court of Appeals).

The Court of Appeals needs to be reminded that certain life-styles "different from those of the majority culture" are not protected—they are outlawed. Life-styles, such as those of gangsters and terrorists, may indeed feel harassed by the restrictions of the National Firearms Act with its limitations on distribution of machine guns and destructive devices. And such life-styles also include those of dealers in illegal drugs or their paraphernalia who may have their activities restricted by the state in order to protect the health and safety of the "majority culture."

Courts that shrug off the all-out assault by the multi-billion dollar illegal drug industry upon this nation, and particularly its youth, as merely a difference of life-style or political views are terribly mistaken. Illegal drugs are precisely that—illegal. Condoning their use through euphemisms such as "political views" or "life-styles" signals to the public that laws prohibiting their use need not be obeyed. Civilized society exists on the basis of public acceptance of and respect for duly enacted laws; whether an individual agrees with a law, he must obey it until it is changed. He may speak against the law, he may in any other reasonable way seek to change the law, but he must obey the law until it is changed by lawful authority.

The Court of Appeals struck another discordant note in its observance that

> "[t]he lack of a criminal penalty in the ordinance does not excuse vagueness where the effect is to deprive

> persons of constitutional rights." *Flipside,* 639 F.2d at 378.

This statement is best rebutted by the District Court which had already found that

> "there is no conceivable colorable claim of a fundamental constitutional right to sell items which facilitate and encourage the use of illegal drugs." *Flipside,* 485 F. Supp. at 410.

Suffice it to say that amicus believes wholeheartedly that the view of the District Court is the correct one as to this and every other aspect of the case.

CONCLUSION

The thrust of the Ordinance at issue is not complex. It purports to regulate items "designed or marketed for use" with illegal drugs as defined by state law. There is nothing vague about this standard. If the retailer chooses to stock an item manufactured for use with illegal drugs, he brings himself within the scope of the Ordinance. If he chooses to market an item of otherwise innocent design in such a manner as to suggest that it be used with illegal drugs, he brings himself within the scope of the Ordinance. That is readily understandable to businessmen of ordinary intelligence and certainly to those in the drug paraphernalia trade.

It is well within the health, safety, and welfare powers of local government to regulate and indeed prohibit the sale of items which in the words of the District Court "facilitate and encourage the use of illegal drugs." Amicus

Community Action Against Drug Abuse therefore urges this Court to reverse the decision of the Court of Appeals and find that the Ordinance provides fair notice of its coverage for any person who wishes to abide by it.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE VILLAGE OF WILMETTE, ILLINOIS, an Illinois Municipal Corporation

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TABLE OF CONTENTS

	PAGE
INTRODUCTORY STATEMENT	1
INTEREST OF AMICUS CURIAE	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	6
ARGUMENT:	
A.	
Municipalities Have The Power Under The United States Constitution To Regulate The Sale Of Drug-Related Devices	7
B.	
Wilmette Has Broad Authority Under Illinois Law To Adopt Drug Paraphernalia Licensing Regulations	8
C.	
Wilmette's Ordinance Differs From The Hoffman Estates Ordinance In Several Important Respects	9
D.	
Wilmette's Ordinance Meets The Requirements Of The Vagueness Standards	11
(1) Wilmette's Ordinance Gives Fair Notice	12
(2) The Regulations Do Not Impermissibly Delegate Legislative Responsibility	14
E.	
Wilmette's Ordinance Is Not Overbroad	15

F.

Less Precision Is Needed In Definitions Which Form The Basis For A Licensing Ordinance 15

CONCLUSION 20

APPENDIX:

Chapter 11, Wilmette Village Code: Restrictions And Prohibitions Relating To Smoking Paraphernalia In General And To Items Designed And Marketed For Use With Cannabis Or Drugs 1a

TABLE OF AUTHORITIES

Cases

Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952) 17

Brache v. County of Westchester, 507 F.Supp. 566 (S.D.N.Y. 1981) 14, 16

Casbah, Inc. v. Thone, et al., ... F.2d ....., (8th Cir., June 8, 1981) 15, 16

Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d 373 (7th Cir. 1981) 3, 7

Geiger v. City of Eagan, 618 F.2d 26 (8th Cir. 1980) 7, 20

Grayned v. City of Rockford, 408 U.S. 104 (1972) 8, 11, 14, 15

Hejira Corp. v. MacFarlane, ... F.2d ..... (10th Cir. 1981) 7, 16

Houseworth v. Glisson, 485 F.Supp. 29 (N.D.Ga. 1978), *aff'd* 614 F.2d 1295 (5th Cir. 1980) 18

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 17
Mid-Atlantic Accessories Trade Ass'n v. State of Maryland, 500 F.Supp. 834 (D.Md. 1980) 16
Music Stop, Inc. v. City of Ferndale, 488 F.Supp. 390 (E.D.Mich. 1980) 21
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 17
Record Revolution, Inc. v. City of Parma, 638 F.2d 916 (6th Cir. 1980) 7, 15
Rose v. Locke, 423 U.S. 48 (1975) 18, 19
Smith v. Gougen, 415 U.S. 566 (1974) 17
Schultz v. Securities and Exchange Commission, 614 F.2d 561 (7th Cir. 1980) 17
Tobacco Road v. City of Novi, 490 F.Supp. 537 (E.D.Mich. 1980) 16, 21
United States v. National Dairy Products Corp., 372 U.S. 29 (1963) 17
United States v. Petrillo, 332 U.S. 1 (1947) 17

Statutes

Illinois Constitution, 1970, Article VII 8
Ill. Rev. Statutes, Chap. 56½, Sec. 701 *et seq.*, Sec. 1101 *et seq.* 10

In The

Supreme Court of the United States

October Term, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, et al.,

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation,

Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

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BRIEF AMICUS CURIAE OF THE VILLAGE OF WILMETTE, ILLINOIS, an Illinois Municipal Corporation

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INTRODUCTORY STATEMENT

This brief is filed pursuant to the authority granted by Rule 36(4.) of the Rules of the Supreme Court of the United States by the Village of Wilmette, Illinois, an Illinois municipal corporation. The Village of Wilmette is appearing as amicus curiae in support of the position

necessarily taken by the Appellant herein, the Village of Hoffman Estates, that municipalities may require those persons who sell drug paraphernalia items to obtain a license as a condition to do such business.

This brief is filed by the Village of Wilmette, an Illinois Municipal Corporation. Rule 36(4.) permits such filing without consent by ". . . a political subdivision of a State . . . sponsored by the authorized law officer thereof." The Village of Wilmette is such a political subdivision and the attorney herein is the duly appointed and acting Corporation Counsel of said municipal corporation.

The Corporate Authorities of the Village of Wilmette are deeply concerned with the issue in this case and the immediate effect on its citizens and, therefore, have authorized and directed the filing of this brief amicus curiae.

INTEREST OF THE AMICUS CURIAE

The Village of Wilmette, Illinois (hereinafter called "Wilmette") is a municipality with a population of approximately 28,000 persons. Wilmette is situated on the western shoreline of Lake Michigan, immediately north of the City of Evanston. Under the Illinois Constitution of 1970, Wilmette is a home rule unit of government.

Within Wilmette's boundaries there are four public elementary schools, one public junior high school, two parochial elementary schools, and two Catholic high schools. Within a mile of Wilmette's northern boundaries are two public high schools servicing New Trier Township, of which Wilmette is a part.

On December 16, 1980, the Corporate Authorities of Wilmette, acting in response to a strong community plea for regulation of persons then believed to be selling drug paraphernalia items in Wilmette, adopted Ordinance 80-0-50. This ordinance did not prohibit the sale of such items to persons 18 years of age or older, but the ordinance did require persons selling or offering to sell drug paraphernalia items to obtain a license from Wilmette and to maintain certain records.

In preparing Ordinance 80-0-50, Wilmette reviewed the drug paraphernalia ordinance adopted in February 1978 by the nearby Village of Hoffman Estates. As of December 1980, the Hoffman Estates ordinance had been found valid by the local United States District Court (*The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 485 F.Supp. 400 (N.D. Ill. 1980).) Although Wilmette did not follow *verbatim* the Hoffman Estates ordinance, it would be fair to say that the Hofman Estates ordinance served as Wilmette's "drafting model." (It should be noted that several other communities in the Chicago area also adopted licensing ordinances similar to the Hoffman Estates ordinance. Among these are the Villages of Skokie, Glenview and Winnetka.)

In January 1981, the United States Court of Appeals, Seventh Circuit, reversed the District Court's judgment in the *Hoffman Estates* case and held that the *Hoffman Estates* ordinance was unconstitutional on the grounds that the ordinance and the guidelines adopted in connection with the ordinance failed to adequately define the items to be regulated, thus leaving a retailer unable to determine what the law expected of him. In other words, the Hoffman Estates ordinance was declared void for vagueness. *The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d 373 (7th Cir.

1981) (hereinafter referred to as the "Hoffman Estates Case").

Promptly after the decision of the Seventh Circuit in the Hoffman Estates Case, Wilmette held further hearings in respect of its own ordinance. On April 7, 1981, Wilmette adopted Ordinance 81-0-12, which made substantial changes in the provisions of Wilmette's earlier ordinance. These changes reflected an effort by the Corporate Authorities of Wilmette to avoid the drafting infirmities which led the Seventh Circuit Court of Appeals to declare unconstitutional the Hoffman Estates ordinance.

The effect of Ordinances 80-0-50 and 81-0-12 was to amend the Wilmette Village Code by adding a new Chapter 11 thereto. Chapter 11 is attached to this brief as an Appendix.

Because of the position occupied by the Hoffman Estates ordinance in the development of Wilmette's drug paraphernalia ordinance, the decision of the United States Supreme Court to take the Hoffman Estates Case on appeal is of great concern to Wilmette. In filing this amicus curiae brief, Wilmette will not make any arguments directed specifically to the constitutionality of the particular ordinance which is the subject of the Hoffman Estates Case appeal. Wilmette will argue, however, that—

a) a municipality may, with a properly drawn ordinance, regulate the sale of drug paraphernalia items;
b) if the Hoffman Estates ordinance is found to be constitutional, it is *a fortiori* that Wilmette's regulation of the sale of drug paraphernalia items is constitutional;

c) if the Hoffman Estates ordinance is found not to be constitutional, Wilmette's regulation of the sale of drug paraphernalia items remains valid because Wilmette has adopted an ordinance which is neither vague nor overbroad;
d) if this Court should affirm the decision of the Court of Appeals, the decision of this Court should not jeopardize the enforceability of licensing ordinances which differ from the Hoffman Estates ordinance; and
e) in all events, this Court should, by its decision herein, bring order to the chaotic situation which presently exists in respect of drug paraphernalia ordinances and statutes.

STATEMENT OF THE CASE

The statement of the case as set forth in Appellant's Jurisdictional Statement is adopted by the Village of Wilmette for purposes of this brief amicus curiae.

SUMMARY OF ARGUMENT

Municipalities have the power to regulate the sale of drug paraphernalia items. That power may be exercised in the form of a licensing ordinance.

Licensing ordinances may be drafted in a variety of ways. The ordinance of amicus Village of Wilmette reflects an approach to the problem of defining what constitutes a drug paraphernalia item which is different from the approach taken by Appellant Village of Hoffman Estates.

Wilmette's ordinance is not vague since it gives adequate notice to all concerned of what the law requires and the ordinance does not impermissibly delegate to police officers or to the courts that which is really a legislative responsibility. Because Wilmette's ordinance is not vague, it is not overbroad.

A licensing ordinance need not be as precise as a criminal statute. Since ordinances which absolutely ban drug paraphernalia and impose criminal sanctions for their violation have been upheld, a precise licensing ordinance must be valid.

Because of the lack of uniformity in decisions on this subject, even within the same Federal district, a decision by this Court which contains definite drafting guides is urgently needed.

ARGUMENT

A.

MUNICIPALITIES HAVE THE POWER UNDER THE UNITED STATES CONSTITUTION TO REGULATE THE SALE OF DRUG RELATED DEVICES.

The Federal courts—including even those courts which have struck down drug paraphernalia laws—have repeatedly said either explicitly or in effect that there is no inherent prohibition against the regulation of the sale of drug-related devices. See *Geiger v. City of Eagan*, 618 F.2d 26, 28 (5th Cir. 1980) ("[A city] clearly has the power through a properly drawn ordinance to discourage the availability of drugs and the acceptance of drug use by prohibiting the sale of drug-related devices."); and *The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d 373, 377 (7th Cir. 1981) (". . . the village may, with a properly drawn ordinance, regulate drug paraphernalia"); *Cf. Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 937 (6th Cir. 1980) ("The regulatory interest of Parma, Lakewood and North Olmsted in stopping drug abuse is plainly substantial").

The recent decision of the Tenth Circuit Court of Appeals in *Hejira Corporation v. MacFarlane*, ... F.2d ..... (10th Cir. 1981) (Slip Opinion) makes this point particularly well:

> "The enactment of drug laws are certainly within the police power of the State . . . [Such laws] go directly to the health, welfare and the public concern for the inhabitants of the State of Colorado. In the General Assembly's exercise of its police power to protect the public health, safety, morals and welfare, the purposes of the Act in question are both constitutionally and logically sound . . . [T]here is a

> nexus between the abuse of controlled substances and the glorification of devices which facilitate such abuse . . . There is a rational relationship between these laws and a legitimate government purpose." (Quoted approvingly from the District Court's opinion, No. 80-F-824, D.Colo. Sept. 5, 1980.)

Wilmette, like many communities in the United States, including particularly those which are located in urban areas, has ample reason to be concerned about drug abuse. When the Corporate Authorities of Wilmette adopted Wilmette's drug paraphernalia ordinance, the President and Board of Trustees were responding to concerns by parents, school administrators and others involved with young people. Drug abuse was and still is perceived as a serious problem; it would be ignoring reality to deal with this subject on any other basis. (Compare *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972): "We would be ignoring reality if we did not recognize that the public schools in a community are important institutions, and are often the focus of significant grievances.")

B.

WILMETTE HAS BROAD AUTHORITY UNDER ILLINOIS LAW TO ADOPT DRUG PARAPHERNALIA LICENSING REGULATIONS.

Wilmette (like the Village of Hoffman Estates) is a home rule unit of government under Illinois law. Such units of government have direct authority under the Constitution to:

> "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; *to license*;" (Illinois Constitution, 1970, Article VII, Section 6(a)) [Emphasis added.]

In exercising this authority with respect to drug paraphernalia items, Wilmette elected to use its *licensing* powers. No attempt was made to *prohibit* the sale of any item of property, except as to minors. Thus, insofar as the basic statutory framework is concerned, Wilmette's treatment of drug paraphernalia dealers is comparable to the treatment of dealers in a variety of other products e.g., liquor retailers, gunsmiths, tobacco dealers, and others, all of whom are required to obtain a license as a condition to conducting business in Wilmette. Wilmette's drug paraphernalia ordinance should not be confused with those statutes or ordinances adopted in other communities or by certain states, including those statutes or ordinances which are based on Drug Enforcement Administration "Model Act", which prohibit the sale, manufacture or possession of drug paraphernalia items, and which make the violation of such statutes or ordinances a crime.

C.

WILMETTE'S ORDINANCE DIFFERS FROM THE HOFFMAN ESTATES ORDINANCE IN SEVERAL IMPORTANT RESPECTS.

Although the Hoffman Estates ordinance may have been the "drafting model" for the first version of Wilmette's ordinance, Wilmette's present ordinance is different from the ordinance presented to the Court in this appeal in several important respects. These differences are as follows:

(1) The Hoffman Estates ordinance uses a two-step process to bring property within the scope of the ordinance: first, the property must be analyzed in terms of a "designed or marketed for use" test, and second, the use must be linked to "illegal cannabis or drugs, as defined by Illinois Revised Sta-

tutes." Wilmette's ordinance involves a different analytical process in arriving at the definition of what is covered. Under the Wilmette approach, property is examined in terms of whether (i) its "primary function" is (ii) to "facilitate the ingestion" of (iii) "cannabis and/or a controlled substance." Wilmette's ordinance, unlike the Hoffman Estates ordinance, then goes on to provide more specific content to these terms.

(2) Under the Wilmette ordinance, "cannabis" and "controlled substances" are tied directly and specifically to the definitions developed by the State of Illinois in the State laws on these subjects.*

(3) The Wilmette ordinance goes on to place certain items within the definition of "drug paraphernalia items" without resort to any analytical process. On the other hand, certain other items are excluded from the ordinance without resort to analysis. The Hoffman Estates ordinance does not use this technique.

(4) In recognition of the fact that there will be a gray area in which further analysis will be required, Wilmette's ordinance provides for a review process which culminates, at the licensee's option, with Wilmette's legislative body. Here, again, no such procedure is found in the Hoffman Estates ordinance.

All of these points of difference have significant implications to the "vagueness" and "overbreadth" prob-

* Thus, "cannabis" means cannabis as defined in the Cannabis Control Act, Ill.Rev.Stat., Ch. 56½, Sec. 701 *et seq.* "Controlled substances" means controlled substances as defined in the Controlled Substance Act, Ill.Rev.Stat., Ch. 56½, Sec. 1101 *et seq.*

lems, discussed below. The point now to be made, however, is that Wilmette's ordinance is different from the Hoffman Estates ordinance in terms of the process used to determine whether an item of property is or is not within the scope of the ordinance.

D.

WILMETTE'S ORDINANCE MEETS THE REQUIREMENTS OF THE VAGUENESS STANDARDS.

The Hoffman Estates ordinance was stricken on the ground that the definition of the subject matter of the ordinance, i.e., the definition of drug paraphernalia items, was so vague as to violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. The standards used by the court in reaching that decision were those set forth in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972):

> ". . . Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws *give the person of ordinary intelligence a reasonable opportunity to know what is prohibited*, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law *impermissibly delegates basic policy matters* to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Emphasis added].

Wilmette submits that the techniques adopted in its ordinance result in a definition which meets the standards of the *Grayned* case and the 7th Circuit opinion in the Hoffman Estates Case.

(1) Wilmette's Ordinance Gives Fair Notice.

The Hoffman Estates ordinance, like a number of other ordinances found wanting by the courts, has floundered on phrase "designed or marketed for use with illegal drugs." There is no need to discuss herein the several difficulties which the courts have found with that phrase, both in total and in its constituent elements. It will suffice to say that Wilmette has avoided the use of the phrase and has taken a different approach to the problem of advising licensees and prospective licensees as to what is expected of them.

Wilmette's ordinance necessarily starts with a general definitional statement of what constitutes "drug paraphernalia items." As noted above, in drawing the relationship of such items to drugs, reference is made to specific state statutes as to what drugs are relevant, viz., cannabis and controlled substances. Wilmette's ordinance then identifies 12 items which are *deemed* to come within the definition of drug paraphernalia items.

Obviously, in deeming items to be covered by a general definition, the legislative body must not be arbitrary. The list of items deemed to be drug paraphernalia items in Wilmette's ordinance was assembled after reviewing expert authority, including the Model Drug Paraphernalia Act as drafted by the Drug Enforcement Administration of the United States Department of Justice and presentations of local persons familiar with the use of drugs.

A list of "deemed items" could still leave problems under the vagueness tests of *Grayned* if the words used are broad enough to sweep up items which should not be considered as drug paraphernalia items. The courts have repeatedly found fault with drug paraphernalia statutes on this ground, holding that such statutes im-

permissibly swept into their coverage such items as paper clips, spoons, tie bars, etc. See, e.g., the Hoffman Estates Case, 639 F.2d at 381: "Consequently, stocking any item that could possibly be used as a roach clip, such as an alligator clip or bobby pin, could subject a retailer to the licensing requirement." Wilmette has solved this problem by including a category of items which are deemed *not* to be within the ordinance, notwithstanding that ingenious minds could no doubt turn such items into utensils which facilitate the ingestion of drugs. This approach, in effect, gives content to the requirement of the regulations that the *primary function* of a covered item must be to facilitate the ingestion of the defined drugs.

It is submitted that the approach taken in the Wilmette ordinance permits a readily understandable separation between those items which trigger the licensing requirement and those items which do not, and that the true dealer in drug paraphernalia items has been separated from the drug store operator, the hardware dealer, department stores, and other businesses which are not intended to be covered by the ordinance.

The Wilmette ordinance further recognizes the impossibility of listing every single item of property which does or does not come within the regulations. Therefore, as to those items which fall in the gray area between the specifically included and the specifically excluded items, the Wilmette ordinance provides for resolution of the problem on a case by case basis, using certain objective tests prescribed in the ordinance; these tests are: descriptive literature, the marketing procedures being used by the licensee, and expert testimony. Recognizing the inherent difficulties in this gray area, the ordinance goes on to provide for hearing procedures for any licensee or prospective licensee. These hearing procedures

are intended to accord such persons full due process protection.

The Wilmette ordinance uses a further technique to satisfy the requirements of the vagueness tests. Wilmette has recognized the wisdom of Mr. Justice Marshall's phrase in *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) that "Condemned to the use of words, we can never expect mathematical certainty from our language." Accordingly, Wilmette's ordinance goes beyond linguistic statements of what is deemed to be within the statute and provides for the publication of a pamphlet which will contain at least one photograph of each of the items deemed to be a drug paraphernalia item. It is difficult to see how more certainty can be provided to those who must determine if their activities will be within the licensing requirements.

(2) The Regulations Do Not Impermissibly Delegate Legislative Responsibility.

The second vice noted in *Grayned* in respect of vague statutes is that such statutes impermissibly delegate basic policy matters to policemen, judges and juries. Wilmette's ordinance avoids this infirmity by giving any prospective licensee or licensee the right to take a definitional problem through several administrative reviews and then to the Board of Trustees, which is Wilmette's legislative body. Moreover, the policeman, like the retailer, will be guided by the very specific provisions of the ordinance as described above. Accordingly, Wilmette has avoided the situation found unsatisfactory to a number of courts wherein it is the policeman who, in attempting to enforce an ordinance, is required to make an arbitrary decision as to whether an item is or is not covered by the statute. (See, e.g., *Brache v. County of Westchester*, 507 F. Supp. 566 (S.D.N.Y. 1981).)

E.

WILMETTE'S ORDINANCE IS NOT OVERBROAD.

"A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 103, 114. The terms used in many statutes and ordinances of "use" or "intended for use", have been held "not vague or overbroad". *The Record Revolution v. City of Parma*, 639 F.2d 916 (6th Cir. 1980).

The Wilmette ordinance is equally specific referring to those things "the primary function of which is to facilitate the ingestion of cannabis and/or a controlled substance," or in other words, "use."

The use of cannabis is surely not "constitutionally protected conduct" since its use or even possession is illegal in Illinois (and the other 49 states, although penalties differ).

Overbreadth was recently considered as "merely a species of the vagueness argument" by the Eighth Circuit Court of Appeals in *Casbah, Inc., et al. v. Thone*, ... F.2d ....., June 8, 1981. When the test of specificity had been met, as the court held there, and we believe is true here, it follows that the ordinance is not overbroad.

Finally, by specifically excluding items from the scope of the ordinance, Wilmette has dealt directly with the overbreadth problem.

F.

LESS PRECISION IS NEEDED IN DEFINITIONS WHICH FORM THE BASIS FOR A LICENSING ORDINANCE.

It cannot be emphasized too strongly that Wilmette's ordinance, like Hoffman Estates' ordinance, requires

only that persons subject to the ordinance must be licensed; no activity is prohibited, except for the sale of drug paraphernalia items to minors. Thus, at most, the violator of the ordinance might be enjoined from carrying on business unless and until the requisite license is obtained or reinstated, but no criminal prosecution is contemplated by the ordinance.

This fact distinguishes the Wilmette and Hoffman Estates approach from the numerous cases which have arisen in respect of statutes or ordinances which prohibit the sale of drug paraphernalia items. Many of these statutes are based upon the Drug Enforcement Administration's "Model Act." That Act makes the intent of the seller a part of offense. As noted in *Brache v. County of Westchester*, 507 F.Supp. 566 (S.D.N.Y. 1981) at p. 577: "The element of scienter necessary to preserve a law from vagueness adds, by definition, another fact for the prosecution to establish by competent evidence. The drafters of the Model Act sought to eliminate vagueness and transferred intent by requiring the requisite elements of knowledge or intent on the part of the manufacturer, seller or user, in order to bring a particular artifact within the definition of "drug paraphernalia."

This approach has led some courts to uphold prohibition statutes and ordinances (e.g., *Hejira Corporation v. MacFarlane*, ... F.2d ..... (10th Cir. May 5, 1981) (Slip Opinion), *Casbah, Inc., et al v. Thone, State of Nebraska, et al*, ... F.2d ..... (8th Cir., June 8, 1981) (Slip Opinion), *Mid-Atlantic Accessories Trade Ass'n v. State of Maryland*, 500 F.Supp. 834 (D.Md. 1980), and *Tobacco Road v. City of Novi*, 490 F.Supp. 537 (E.D.Mich. 1980)). Regardless of the outcome in these cases, the courts were properly concerned with the proposition that the words of a penal statute must be clear and beyond spec-

ulation. See *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).*

The Supreme Court has observed, in a case involving void for vagueness principles, that "In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (dictum). *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952), *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), and *United States v. Petrillo*, 332 U.S. 1 (1947), were cited in support of the foregoing statement. For a recent application of this principle, see *Shultz v. Securities and Exchange Commission*, 614 F.2d 561, 570-71 (7th Cir. 1980).

Both the Wilmette and Hoffman Estates ordinances are licensing ordinances and thus they regulate those who are consciously in profit making ventures. Such persons are presumed to understand and conform to building, zoning, health, safety and tax regulations, many of which are less specific than the ordinances considered here.

The point to be made is that great care must be taken in analyzing the Hoffman Estates and Wilmette type of ordinance by reference to the principles applicable to criminal statutes. It does not follow that the reasoning of those courts which have invalidated statutes based on the Model Act would necessarily apply so as to invali-

* Special precision is also required for a statute or ordinance which threatens fundamental rights such as free speech. See *Smith v. Gougen*, 415 U.S. 566, 572-73 (1974). It is inconceivable that the sale of drug-related devices involves free speech or other First Amendment considerations. See Point E, *supra*.

date a licensing statute. (It would seem, however, that those courts which have sustained statutes based on the Model Act would, *a fortiori*, hold Wilmette's ordinance valid and perhaps, also, the Hoffman Estates ordinance.)

The foregoing is not an argument that free rein may be taken by a legislative body in the drafting of licensing statutes. Wilmette does not quarrel with the proposition that if a licensing ordinance does not give adequate warning of the activity which would lead to license revocation, the ordinance is invalid. *Houseworth v. Glisson*, 485 F.Supp. 29 (N.D. Ga. 1978), *aff'd* 614 F.2d 1295 (5th Cir. 1980). Neither does Wilmette quarrel with the proposition stated in a footnote in the *Hoffman Estates* Case that "There are obvious differences between *revoking* a license on the basis of inadequately defined conduct and *requiring* a license in order to engage in the conduct. But in both cases, because of the retailer's constitutionally protected interest in his business, the ordinance must be drawn clearly enough to warn a retailer of what the law requires." 639 F.2d at 378, n. 12. It is important to remember, however, the point made in *Rose v. Locke*, 423 U.S. 48, 49-50 (1975):

> "It is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.' [citations omitted]. But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.' [citations omitted]. Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions

> before they may say with any certainty what some statutes may compel or forbid. . . . All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden."

The foregoing statement was a prelude to the holding that a Tennessee statute which prohibited "crimes against nature" was not unconstitutionally vague. Noting that the phrase had been in use among English-speaking people for many centuries, the court felt that "Anyone who cared to do so could reasonably determine what particular acts have been considered crimes against nature. . . ." 423 U.S. at 50. By the same token, the items deemed to be drug paraphernalia items in Wilmette's ordinance, while perhaps not known as such for many centuries, are certainly well known to anyone even mildly conversant with drug-related devices, and any businessman, who cares to do so can certainly determine whether his wares will be considered "drug paraphernalia items" under Wilmette's ordinance.

Warning the party affected of "what the law requires" is the crux of both the prohibition statutes and the licensing statutes insofar as the requirements of due process are concerned. The point still remains, however, that somewhat more latitude should be allowed where language which may be less than perfectly precise appears in a licensing statute as opposed to a criminal statute. Wilmette submits that the Hoffman Estates ordinance (and its own ordinance) should be evaluated in that light.

CONCLUSION

The purpose of this amicus curiae brief has not been to urge this Court to reverse the Seventh Circuit Court of Appeals and to sustain the validity of the Hoffman Estates ordinance. Although Wilmette considers that result to be the proper one, the argument to that end will be ably made by Hoffman Estates' own counsel.

This brief has been filed to make the point that even if the ordinance now before the Court should be struck down, the Court's opinion need not and should not stand as a general condemnation of statutes and ordinances which subject dealers in drug paraphernalia to licensing requirements.

It would be presumptuous for Wilmette to claim that it has acopted a model licensing ordinance. Wilmette believes that it has adopted an ordinance which tells all concerned "what the law requires" and Wilmette can without hesitation claim to have made a bona fide effort to draft an ordinance which satisfies the vagueness and overbreadth standards established by the courts. If, despite Wilmette's best efforts, the Court's opinion in this case is such as to place Wilmette's ordinance in jeopardy, then Wilmette submits that it is also the Court's responsibility to tell communities such as Wilmette just what is required of them. To do less than that would render hollow the statement which repeatedly appears in the decisions of the lower courts, including the Seventh Circuit Court of Appeals in this case,*

* Quoting from *Geiger v. City of Eagan*, the Seventh Circuit Court of Appeals said: ". . . a city 'clearly has the power through a properly drawn ordinance to discourage the availability of drugs and the acceptance of drug use by prohibiting the sale of drug-related devices'." 639 F.2d at 377.

that municipalities have the power to regulate the sale of drug paraphernalia items under properly drawn ordinances. It is of little consolation to communities which are concerned with problems of drug abuse to be told that in theory they have the power to act when in practice the power cannot be exercised.

Any student of drug paraphernalia statutes and ordinances knows that the law in this area is presently in a chaotic condition.* Wilmette urges the Supreme Court to take advantage of this case to indicate with specificity what is required for a constitutional drug paraphernalia licensing ordinance.

Respectfully submitted,

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July 16, 1981

* A clear example of the chaos is the Southern Division of the Eastern District of Michigan. In the same division, identical ordinances were treated in opposite ways. *Tobacco Road v. City of Novi*, 490 F.Supp. 539 upheld ordinance; *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390, held ordinance unconstitutional.

APPENDIX

WILMETTE VILLAGE CODE

CHAPTER 11

RESTRICTIONS AND PROHIBITIONS RELATING TO SMOKING PARAPHERNALIA IN GENERAL AND TO ITEMS DESIGNED AND MARKETED FOR USE WITH CANNABIS OR DRUGS

11-1 PROHIBITION OF THE SALE OF SMOKING PARAPHERNALIA TO MINORS.

11-1.1 The sale, barter, gift or exchange of cigarettes, cigars, pipe tobacco, all types of pipes, cigarette papers, and all other materials used for smoking, including, but not limited to, all types of smoking paraphernalia, is hereby prohibited to persons seventeen (17) years of age or under.

11-2 LICENSING THE SALE OF ITEMS DESIGNED OR MARKETED FOR USE WITH CANNABIS OR DRUGS AND PROHIBITING THEIR DISPLAY.

11-2.1 *Definitions.* (a) The term "Drug Paraphernalia Item" means any device, contrivance, effect, accessory or thing whose primary function is to facilitate the ingestion of cannabis and/or a controlled substance.

(b) The following items are deemed to meet the standard set forth in paragraph (a), and the following items are therefore "Drug Paraphernalia Items" within the meaning of this ordinance:

(1) carburetion tubes and devices;
(2) smoking and carburetion marks;
(3) roach clips;
(4) separation gins;
(5) cocaine spoons and vials;
(6) chamber pipes;
(7) carburetor pipes;
(8) electric pipes;
(9) air driven pipes;

(10) chilams;
(11) bongs; and
(12) ice pipes or chillers.

The Village shall prepare and make available to each licensee or prospective licensee a pamphlet which contains at least one photograph of each of the 12 items listed in this paragraph (b)

(c) The following items are deemed not to meet the standard set forth in paragraph (a), and the following items are therefore not "Drug Paraphernalia Items" within the meaning of this ordinance:

(1) paper clips
(2) tie bars
(3) hand mirrors
(4) spoons
(5) pieces of aluminum foil.

(d) The status of items which may not clearly come within the categories set forth in paragraphs (b) and (c) shall be determined by the municipal authorities on a case-by-case basis in accordance with the standard set forth in paragraph (a) and in accordance with the procedures set forth in other sections of this ordinance.

(e) In applying the phrase "primary function is to facilitate the ingestion of cannabis and/or a controlled substance" to any item, the municipal authorities shall take into account the following matters, to the extent reasonably available: (i) descriptive literature furnished by the designer or manufacturer or wholesaler of the item; (ii) the marketing procedures used by the licensee with respect to the item, including in particular the proximity of the item to Drug Paraphernalia Items or to literature which encourages the use of cannabis or controlled substances; and (iii) testimony from experts on the use of cannabis or controlled substances.

(f) The term "cannabis" means cannabis as defined in the Cannabis Control Act (Ill. Rev. Stat., Ch. 56½, Sec. 701 et seq.)

(g) The term "controlled substance" means controlled substance as defined in the Controlled Substance Act (Ill. Rev. Stat., Ch. 56½, Sec. 1101 et seq.)

11-2.2 *License Required.* It shall be unlawful for any business enterprise, whether organized as a corporation, partnership, sole proprietorship or otherwise, to sell or offer for sale in the Village any Drug Paraphernalia Item without having a license therefor or in violation of the terms of such license.

11-2.3 *License Applications.* (a) An application for a license to sell Drug Paraphernalia Items shall be made to the Village Clerk, shall be signed by the applicant and shall contain the following information:

(1) The address of each location within the Village where the applicant proposes to sell Drug Paraphernalia Items;

(2) The length of time in which the applicant has been in the business of selling Drug Paraphernalia Items;

(3) In the case of an applicant who is an individual, the applicant's name, age and home address;

(4) In the case of an applicant which is a partnership, list of the persons entitled to share in the profits therefrom, the address of the partnership's principal office, and, as an attachment to the application, a true copy of the articles of partnership and all amendments thereto:

(5) In the case of an applicant which is a corporation, a list of the names and addresses of the officers, the directors and each person who owns, directly or indirectly, more than 5% of the stock of such corporation, and, as an attachment to the application, a true copy of the articles of incorporation and all amendments thereto;

(6) The name and home address of the person who will serve as manager of each location identified under item (a);

(b) Each application for a license submitted pursuant to paragraph (a) above shall be accompanied by affidavits signed, respectively, by each of the persons identified under items (3), (4) or (5) that such person has never been convicted of a drug-related offense.

(c) Each application for a license submitted pursuant to paragraph (a) above shall be accompanied by a check for $150 in payment of the initial fee for such license.

11-2.4 *Term.* Each license issued under this Chapter 11 shall terminate one year from the date of issuance. Renewal applications shall be submitted not less than 30 days prior to the expiration of the license. Each renewal application shall be accompanied by a check for $150 in payment of the renewal fee for such license. In addition, each renewal application shall be accompanied by a statement that either there are no changes in the information then on file with the Village in connection with Section 11-2.3 or, if any changes have occurred, a description of the changes.

11-2.5 *Conditions to Continuing Effectiveness of Licenses.* Notwithstanding Section 11-2.4, each holder of a license issued pursuant to this Chapter 11 shall, as a condition to the continuing effectiveness of such license, furnish the following information to the Village Clerk:

(1) An affidavit signed by each employee of the licensee to the effect that such employee has never been convicted of a drug-related offense. Such affidavit shall be submitted within seven days after the employee has been employed by the licensee.

(2) A notice of any changes in the information previously submitted under items (3), (4), (5) or (6) of Section 11-2.3(a). Such notice shall be given within seven days after the occurrence of the event which requires the notice to be given. Whenever the notice identifies a new person for inclusion in the list of persons required under items (3), (4) or (5) of Section 11-2.3(a), the notice shall be accompanied by an affidavit from such person in the form described in Section 11-2.4(b).

11-2.6 *Sales by Minors.* It shall be unlawful for any licensee to permit any person under 18 years of age to sell or give any drug paraphernalia item in a licensed establishment.

11-2.7 *Sales to Minors.* It shall be unlawful to sell or give any Drug Paraphernalia Item to any person under 18 years of age.

11-2.8 *Records.* Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature. Such records shall be retained for not less than two (2) years.

11-2.9 *Display.* It shall be unlawful to publicly display in any business establishment within the Village of Wilmette which permits persons under the age of eighteen (18) years to enter into its place of business any Drug Paraphernalia Items, effects, accessories or things designed or marketed for use with cannabis or drugs as defined in Section 11-2.1.

11-2.10 *Hearing Procedures.* (a) The determination as to whether any device, contrivance, effect, accessory or thing is a Drug Paraphernalia Item shall be made initially by the Chief of Police. Any licensee or prospective licensee who disagrees with the determination made by the Chief of Police may request a hearing on the matter. Said hearing shall be conducted by the Judiciary committee of the Board of Trustees. The hearing shall be held upon not less than five days' notice to the public and to the licensee or prospective licensee. The Judiciary Committee may continue the hearing from time to time without further notices except by public announcement at the hearing and the entry of the continuation in the minutes of the hearing.

(b) At any hearing held by the Judiciary Committee, a record of the proceedings shall be kept. The Judiciary Committee shall take evidence from the licensee or prospective licensee and from the Chief of Police and may take evidence from such other persons as the Committee sees fit. The Committee shall prepare a report of its findings of fact and its conclusions and transmit copies thereof to the licensee or prospective licensee and to the Board of Trustees.

(c) Final action on the matter shall be taken by the Board of Trustees. The action of the Board of Trustees shall be a final administrative determination and shall be subject to judicial review in accordance with applicable Illinois statutes.

11-3 SEVERABILITY. If any word, phrase, clause, sentence, paragraph, section or sub-section of Chapter 11 of the Wilmette Village Code is found to be invalid, this shall not affect the validity of the remaining words, phrases, clauses, sentences, paragraphs, sections or subsections.

11-4 PENALTY. The penalty for violation of any provision of this Chapter 11 shall be as set forth in Section 1-12.1 of the Wilmette Village Code.

11-5 REVOCATION OF LICENSE. The Village Manager shall have the authority to revoke all licenses and permits issued to any person who violates any provision to this Chapter 11. He shall establish rules and regulations to provide a fair hearing prior to any such revocation. The revocation of a license or permit shall not bar any other enforcement procedure and shall not bar the imposition of a fine.